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No. __-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

REVEREND ROBERT PEARSON, *et al.*,

Petitioners,

—v.—

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has twice before granted certiorari and intervened in the instant case to twice vacate the phenomenally large criminal contempt penalties and attorneys' fees, totaling over $600,000, which were levied against Petitioners for participating in large anti-abortion sit-in demonstrations. *See*, *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901, 113 S. Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix H: 78a). ("*Pearson I*") and *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 512 U.S. 1249, 114 S. Ct. 2776 (Appendix F: 74a) ("*Pearson II*") In *Pearson I*, this Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct.753, 122 L.Ed.2d 34 (1993). This Court in *Bray* held that there was no federal cause of action against abortion clinic protesters under 42 U.S.C. § 1985(3) and further vacated the 42 U.S.C. § 1988 award of attorneys' fees. The court of appeals in the decision below held that *Bray* was inapplicable, and it applied 18 U.S.C. § 248 retroactively to bolster its award of § 1988 attorneys' fees. Further, retroactivity, as it applies to attorneys' fees statutes is before this Court in *Johnson v. Haddix*, No. 98-262. Against this background, the first question presented is:

> Whether a party is entitled to attorneys' fees under 42 U.S.C. § 1988(b) after this Court has ruled that there is no federal cause of action for which a party could have been a "prevailing party", however, the original

underlying judgment in favor of the party is not on direct review but all of the attorneys' fees award is on direct review?

2. In *Pearson II*, this Court granted certiorari in this case a second time, vacating the judgment of the court of appeals and remanding for further consideration in light of with *United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) ("*Bagwell*"). The Second Circuit, misapplying *Bagwell* in the decision below ("*Terry V*"), upheld criminal contempt fines reinstated by the district court along with a so-called "purge provision." This directly conflicts with the holding of the Eleventh Circuit in *In re E.I. DuPont de Nemours & Co. – Benlate Litigation*, 99 F.3d 363, (11th Cir. 1996). Against this background, the second question presented is:

> Whether a contempt sanction is criminal in nature, thus requiring that the alleged contemnor be afforded criminal due process protection before the sanction can be imposed, wherein the sanction presents the contemnor with the choice between either paying large, determinate, non-compensatory fines or performing an alternative action, such as publishing an acknowledgement of having violated the court order or promising not to again violate the order, wherein the alternative action required to be performed was not part of the original court order and wherein the alleged past violation can no longer be undone or cured?

The Eleventh Circuit held that this was a criminal contempt penalty and the Second Circuit disagreed, holding that this was a civil penalty.

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMongagle, Jeff White, Bistate Operation Rescue Network (B.O.R.N.), Randall A. Terry, Thomas Herlihy, and Operation Rescue.

The Petitioners were defendants and non-party contempt Respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. the City of New York did not seek contempt citations

against either the defendants or non-party petitioners in the proceedings at issue in the courts below. The United States was a judgment creditor (by virtue of the contempt fines) in the district court and a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonghele, Jeff White, Bistate Operation Rescue Network (B.O.R.N.), Randall A. Terry, Thomas Herlihy, and Operation Rescue (the "Petitioners") respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

DECISIONS BELOW

The opinion of the court of appeals that gives rise to this petition is reported at 159 F.3d 86 (2d Cir. 1998) and is reproduced in Appendix A, pages 1a-24a. The order of the court of appeals denying petitioners' petition for rehearing and declining petitioners' suggestion for rehearing *en banc* is not reported and is reproduced in Appendix B, pages 25a-26a. The opinion of the district court is reported at 952 F. Supp. 1033 (S.D.N.Y. 1997) and is reproduced in Appendix C, pages 27a-59a. The order of the district court dated March 21, 1997 reinstating contempt sanctions and attorneys' fees and § 1988 attorneys' fees is not reported and is reproduced in Appendix D, pages 60a-66a.

The earlier decisions in this case are best discussed in chronological order. The original decisions of the district court in this case, imposing contempt sanctions and awarding attorneys' fees, are reported in 732 F. Supp 388 (S.D.N.Y. 1990) and 737 F. Supp. 1350 (S.D.N.Y. 1990). The appeals from these judgments were consolidated in the court of appeals. The prior decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (Appendix I: 79a-104a). On February 22, 1993, this prior decision of the court of appeals was vacated and remanded by this Court *sub. nom. Pearson v. Planned*

Parenthood Margaret Sanger Clinic (Manhattan), 507 U.S. 901, 113 S. Ct. 1233. (Appendix H: 78a). In a brief *per curiam* decision the court of appeals reinstated its prior judgment without modification, which is reported at 996 F.2d 1351 (2d Cir. 1993) (Appendix G: 75a-77a). On June 30, 1994 this Court again vacated and remanded the decision of the court of appeals, which is reported at 512 U.S. 1249, 114 S. Ct. 2776 (Appendix F: 74a). The subsequent decision of the court of appeals vacating and remanding is reported at 41 F.3d 794 (2d Cir. 1994) (Appendix E: 67a-73a)

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("the Second Circuit") was entered October 21, 1998. The court of appeals denied a timely petition for rehearing on December 8, 1998.

CONSTITUTIONAL AND STATUTORY PROVISION

U.S. Constitution Amendment Five provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

U.S. Constitution Amendment fourteen provides in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988(b) provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or § 13981 of this title, so in original, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorneys' fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

This Court has twice intervened in this very case to vacate the massive contempt fines and attorneys' fees totaling nearly $600,000, which were levied against the Petitioners. The lower courts, in an act of hubris, have taken the unprecedented step of reinstating their previous judgments.

Petitioners are seven individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and purportedly

coercive civil contempt fines totaling $350,000 for alleged violations of the three injunctions.[1]

In addition to these massive fines, attorneys' fees of nearly $250,000 were also assessed (over $150,000 under 42 U.S.C. § 1988 and close to $100,000 in contempt attorneys' fees).

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Petitioners have repeatedly asserted throughout these proceedings that the huge unconditional contempt fines and contempt attorneys' fees were criminal in nature, despite the lower courts' convenient label of "civil contempt penalties."

As part of its rationale for reinstating the 42 U.S.C. § 1988 attorneys' fees award, the Second Circuit retroactively applied 18 U.S.C. § 248 (the Freedom of Access to Civic Entrances Act) (passed in 1994) to Petitioners' demonstrations demonstrations (which occurred in 1988-1989).

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: A temporary restraining order dated May 5, 1988, a preliminary injunction dated October 27, 1988, and a permanent injunction dated January 10, 1989.

[2] *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990) (hereinafter "*Terry I*").

This Court is presently reviewing similar issues of retroactivity in the *Johnson v. Haddix*, No. 98-262.

A. Course of Proceedings

The district court had earlier issued a permanent injunction in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totaling $350,000 and attorneys' fees. The consolidated appeal upholding these huge fines and attorneys' fees was decided on April 13, 1992 by the court of appeals in *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (hereinafter "*Terry II*") (Appendix H: 79a-104a).

On February 22, 1993, the 1992 *Terry II* decision was vacated and remanded by this Court *sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*,

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[3] *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod., New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir 1989) ("*Terry I*") *cert. denied*, 495 U.S. 947, 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women) (*Terry I*).

507 U.S. 901, 113 S. Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix H: 78a) ("*Pearson I*") for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) (hereinafter "*Bray*"), rendered on January 13, 1993.

In a 1993 *per curiam* decision,[4] which was rendered purportedly in obedience to this Court's remand for reconsideration in light of *Bray*, and after the parties had briefed this issue, the Second Circuit again reinstated its initial vacated judgment on this appeal, without modification, and without any discussion of *Bray*. Essentially ignoring this Court's *Bray* decision, the 1993 *per curiam* decision inexplicably failed to vacate the § 1988 award of attorneys' fees as this Court did in *Bray*. The court below further failed to remand the issues in this action to the district court, failed to issue further instructions to the district court, and failed to vacate its prior affirmance of the judgment of contempt penalties against Petitioners.

On July 30, 1994, this Court again, for the second time, vacated the judgment of the Second Circuit and remanded for proceedings consistent with *United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). *See Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 512 U.S. 1249, 114 S. Ct. 2776, 129 L.Ed.2d 888 (1994). (Appendix F: 74a) ("*Pearson II*").

On December 2, 1994, the Second Circuit issued its opinion in *New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794, 797 (2d Cir.1994) ("*Terry IV*") which vacated all

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[4] *New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351 (2d Cir. 1993) (*per curiam*; before Kearse, Mahoney, and Snead, Circuit Judges) ("*Terry III*"), attached as Appendix G: 75a-77a.

of the judgments which it had previously affirmed in *Terry II*. Specifically, the Second Circuit vacated the contempt fines and the contempt attorneys' fees holding that the contempt penalties sought had been criminal and that the fines and attorneys' fees had been imposed without the appropriate criminal due process protections. 41 F.3d at 796-797 (Appendix E: 69a-73a). Furthermore, the Second Circuit vacated the § 1988 attorneys' fees on the main case and directed the district court to apply both the *Bray* and *Bagwell* decisions on remand. 41 F.3d at 797 (Appendix E: 73a).

Despite this history, over two years later, the Respondent moved to Reinstate all the judgments, which the District Court did. *See N.Y.S. NOW v. Terry*, 952 F. Supp. 1033 (S.D.N.Y. 1997) (Appendix C: 27a-59a). The Second Circuit affirmed in *New York State Nat'l Org. for Women v. Terry*, 159 F.3d 86 (2d. Cir. 1998) ("*Terry V*") (Appendix A: 1a-24a. The petitioners timely moved for a rehearing which was denied on December 8, 1998 (Appendix B: 25a-26a).

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $350,000 in contempt fines were assessed payable to the United States.

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility [and] . . their purpose was to 'block the doors so they cannot do abortions today'." 732 F. Supp. at 393, 405.

In the 1989 Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989) ("*Terry I*"). The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." *Terry I*, 886 F.2d at 1363.

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
B.O.R.N.	1	$ 25,000

Randall A. Terry	3	$100,000[5]
Thomas Herlihy	1	$ 25,000
		$350,000

It is these phenomenally large contempt penalties, their attendant attorneys' fees, and the fees awarded under 42 U.S.C. § 1988, that the Petitioners seek to have vacated by this Court.

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[5] 732 F. Supp. at 413-414; 961 F.2d at 394. Fines were also assessed against non-Petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violaiton) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398. Nathanson discontinued her appeal. Attorneys' fees were also assessed against all contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395. Terry's and Operation Rescue's fines were joint and several.

REASONS FOR GRANTING THE WRIT

I. This Court's Two Vacate And Remand Orders In *Pearson I and II* Require The Court Of Appeals To Vacate Its Judgment And Remand With Instructions To The District Court To Enter Judgment For Petitioners With An Order To Vacate The § 1988 Attorneys' Fees Award Of Over $150,000. The Second Circuit's Retroactive Application Of 18 U.S.C. § 248 To Bolster The Reinstatement Of Its Vacated Judgment; Despite This Court's Two Mandates Was Erroneous. Similar Issues On The Retroactivity Of Statutes Are pending In *Johnson & Haddix*, No. 98-262.

In *Terry I*, respondents prevailed at the district court with their claim that petitioners' abortion clinic blockades violated 42 U.S.C. § 1985(3). The Second Circuit affirmed, and this Court denied certiorari. Therefore, in *Terry II*, petitioners motioned for attorneys' fees under 42 U.S.C. § 1988. As prevailing parties, this was their right.

All this changed, however, when this Court decided *Bray*. While the decision in *Terry I* had already become final, the award of attorneys' fees in *Terry II* had not, and this Court in fact vacated *Terry II* to be reconsidered in light of *Bray*. *See Pearson I*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix H: 78a).

Therefore, since "subsequent to the judgment and before the decision [became final], a law intervene[d] and positively change[d] the rule which govern[ed the case], th[at] law must be obeyed ... ." *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801) (Marshall, J.). "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment,

rightful when rendered, but which cannot be affirmed but in violation of [present] law, the judgment must be set aside." *Id.*. *The Schooner Peggy* involved a treaty which, by its terms, was to be applied to pending cases; as this Court has made clear, its decisions have similar retroactive effect. *See, e.g. Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517 (1993) (holding that rulings of the Supreme Court "must be given full retroactive effect in all cases still open on direct review").

The district court and Second Circuit violated this longstanding rule and disregarded the two mandates of this Court. Each held that since respondents had prevailed on their 42 U.S.C. § 1985(3) claim in *Terry I*, and 42 U.S.C. § 1988 only asks if the plaintiff prevailed in the underlying case, the subsequent decision in *Bray* should have no bearing on *Terry II*, since respondents victory in *Terry I* was not reversed or vacated as a result of *Bray*. *See NOW v. Terry*, 952 F.Supp. at 1045 (Appendix C: 56a); *Terry V*, 159 F.3d at 96 (Appendix A: 20a-21a). This ignores, however, *Harper*, which requires that the holding of *Bray* be given full retroactive effect in *Terry II*. *Bray* held that § 1985(3) did not apply to the type of conduct at issue in *Terry I*. *See* 506 U.S. at 270, 274, 113 S. Ct. at 759-60, 762. A necessary consequence of that holding is that attorneys' fees could not be awarded under 42 U.S.C. § 1988 to a plaintiff prevailing in a suit to enjoin such conduct.[6] *See id.*, 506 U.S. at 285, 113 S. Ct. at 767-68. While the § 1985(3) issue was settled differently in *Terry I*, the § 1988 issue of *Terry II* was not settled prior to *Bray*. To give *Bray* full retroactive effect, therefore, would require denying an award of attorneys' fees in *Terry II*.

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[6] Such a suit could be brought, for instance, under provisions of state common law, which do not implicate § 1988.

In placing the decision in *Terry I* above *Bray*, the district court and Second Circuit also ignored what this Court has long said: "Unlike other judicial relief, the attorneys' fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 252, 102 S. Ct. 1162, 1166, 71 L.Ed.2d 325 (*citing Hutto v. Finney*, 437 U.S. 678, 695, n.24, 98 S.Ct. 2565, 2576, n.24, 57 L.Ed.2d 522 (1979)). "[A] motion for attorneys' fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment." *Id.* (internal quotation marks and citation omitted). If the underlying judgment and the motion for attorneys' fees are inherently distinct, then, given *Bray*, the district court should not have used *Terry I* as the basis for an award of attorneys' fees under § 1988.

Even assuming that *Bray* did not require the district court to deny respondent's motion on remand, the district court abused its discretion by not denying the motion. As the Second Circuit noted, "[t]here is a presumption that successful civil rights litigants should recover reasonable attorneys' fees unless special circumstances would render such an award unjust." *See Terry V*, 159 F.3d at 97 (Appendix A: 22a) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937 (1983)). Both the district court and circuit court, however, denied that the facts of this case were sufficient to defeat the presumption.

The Second Circuit did refer to the special circumstances of this case, in which denial of certiorari for petitioners in *Terry I* was quickly followed both by a decision - *Bray* - which vindicated petitioners' position, and

by vacatur of the award of attorneys' fees in *Terry II* under the aegis of *Bray*. *See Terry V*, 159 F.3d at 97 (Appendix A: 22a-23a). The court, however, reasoned that since petitioner's were bound by *Terry I*, and Congress passed the FACE Act to "legislatively overrule" *Bray*, reimposition of the award would not be unjust, *Bray* notwithstanding.[7] *See id.*

The Second Circuit erred in this. First, "[O]ne cannot deduce any decision on the merits or other precedential value from [denials of certiorari]." John E. Nowak & Ronald Rotunda, Constitutional Law 28 (5th ed. 1995). "The Court grants certiorari for the interest of the public, not merely for the interest of the parties. Thus, the Court will not ordinarily grant certiorari merely to achieve justice in a particular case." *Id.* (*citing Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 122, 114 S. Ct. 1359, 1362, 128 L.Ed.2d 33 (1994) (per curiam)). Given this Court's acceptance of certiorari for, and decision in, *Bray*, denial of certiorari in *Terry I* seems to speak less to the merits of the case, than to the case management decisions of this Court. The collateral implications *Terry I* involved in the still-pending *Terry II* should have been decided in line with *Bray*, not *Terry I*.

Second, the FACE Act simply cannot be applied to this case. The Second Circuit accepted the district court's argument that passage of the FACE act demonstrates a Congressional intent to penalize petitioner's actions, and that this intent overwhelms any injustice which might arise from awarding attorneys' fees subsequent to *Bray*. *See Terry V*,

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[7] The Second Circuit, to its credit, seems to have dropped the district court's argument that the constitutional protection afforded abortion justified reimposition of the fees, since *Bray* decided that nothing found in the Constitution prohibits actions of the type petitioners performed.

159 F.3d at 97 (Appendix A: 22a-23a). Each element of this argument is constitutionally impermissible. First, there was never a finding that petitioners' conduct would have violated the FACE Act, had that Act even existed at the time petitioners undertook the actions at issue in this case. Moreover, the district court's bald assertion that FACE justifies the imposition of penalties on petitioners violates the Fifth Amendment in two respects.

To begin with, the court assumed, without any proceedings sufficient to do so, that petitioners had violated the FACE Act. This was a blatant violation of due process. A court cannot merely posit a similarity between petitioners' conduct and that which a federal statute prohibits, and, without even finding that petitioners violated that statute, impose penalties on petitioners because of Congress's hypothesized disapproval of petitioner's own conduct. The district court used the FACE Act to justify an award of attorneys' fees under § 1988, even though the Act does not mention § 1988 and it contains its own attorneys' fees provision. *See* 18 U.S.C. § 248 (c)(1)(B). There is no indication in the Act that Congress meant it to be used as a lever to obtain attorneys' fees under § 1988.

Second, and equally egregiously, the court premised petitioners' liability on a statute which did not exist at the time of petitioners' action. This, despite the numerous statements from this court to the effect that retroactivity is not favored in the law, particularly where there is no indication in the applicable statute that Congress intended for it to apply retroactively. See *Landgraf v. USI Film*, 511 U.S. 244, 270–71, 114 S. Ct. 1483, 1499–1500, 128 L.Ed.2d 229 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *Rivers v.*

Roadway Express, Inc. 511 U.S. 298, 305–05, 114 S. Ct. 1510, 1515, 128 L.Ed.2d 278 (1994) ("Congress' decision to alter the rule of law established in one of our cases ... does not, by itself, reveal whether Congress intends the 'overruling' statute to apply retroactively to events that would otherwise be governed by the judicial decision."). Nothing in the FACE Act indicates that Congress meant for it to apply retroactively. Similar issues on the retroactivity of statutes are pending in *Johnson v. Haddix*, No. 98-262.

The district court's and Second Circuit's reimposition of the § 1988 attorneys, while relying on the Court's denial of certiorari in *Terry I*, blatantly disregarded the Court's mandate in granting certiorari in *Pearson I*. Lower federal courts regularly view a remand with directions to reconsider the instant case in light of a specific Supreme Court precedent as an indication from the Court that the precedent should be applied as appropriate. In *United States v. Mills*, 122 F.3d 346, 349-50 (7th Cir. 1997), *cert. denied Mills v. U.S.*, 118 S.Ct. 637, 139 L.Ed.2d 615, the circuit court viewed remand with such instructions as reason enough for reversing a prior decision of that court:

> This disparity between our approach and that of the other circuits would be, standing alone, a sufficient reason for our reconsidering our position. Here, of course, we have an express direction from the Supreme Court to undertake such a reassessment. ... We believe that [the case the Supreme Court referred to in the remand order] makes it clear that we ought to join the rest of the Country in holding [as does that case].

In another case from the Seventh Circuit, the court interpreted a Supreme Court remand to reconsider in light of

a particular precedent sufficient to overcome the dissent's argument that the party favored by that precedent had previously waived consideration of that issue:

> "[T]he Supreme Court has remanded this case for reconsideration in light of [a particular precedent]. The Court has exercised it jurisdiction and remanded this case for reconsideration in light of [that precedent] despite the fact that respondents-appellees did not present the [issue involved] in their petition for a writ of certiorari. In effect, the Court sua sponte has ordered us to reconsider [in light of that precendent]. To find a waiver in this case would be to nullify the Supreme Court's exercise of its jurisdiction and to circumvent its remand order. We appropriately decline to do so.

White v. Finkbeiner, 753 F.2d 540, 543 (7th Cir. 1985).

Marrero v. Dugger, 823 F.2d 1468 (11th Cir. 1987), involved a Supreme Court remand with instructions to reconsider the case in light of *Solem v. Helm*, 463 U.S. 277 (1983), which would require the court on remand to apply a three factor test to petitioner's case. The district court on remand did not seriously analyze the case under the three factor test, but instead simply found one factor to be dispositive. The circuit court vacated and remanded, noting that:

> a remand [from the Supreme Court] would have been unnecessary [if the one factor] itself could be dispositive. There was no reason for the Supreme Court to order a remand if the only factor to be considered by

> the district court was a factor ... that was already before the Supreme Court. [The dissent] seems to suggest that we should assume that the Supreme Court really did not mean what it said when it remanded this case 'for further reconsideration in light of [Helm].' A principled system could not survive with such a basis for decisionmaking by courts subject to Supreme Court review. The mandate of the Supreme Court is clear.

Dugger, 823 F.2d at 1472.

In *Moore v. Zant*, 885 F.2d 1497 (11th Cir. 1989), six of the twelve judges sitting en banc critiqued a plurality opinion for deciding a case on grounds unrelated to those implicated by a Supreme Court remand with directions to reconsider the case in light of Teague v. Lane. The majority claimed that by vacating the circuit court's earlier opinion, the Supreme Court expressed no opinion on its merits, so that the court could decide by reexamining the issues involved in its earlier opinion. *See id.* at 1503. The concurring and dissenting opinions, on the other hand, argued that the remand required the court to look first to the issues raised by the particular precedent the Supreme Court referenced. *See id.* at 1514 (Roney, C.J., specially concurring) ("The Supreme Court affords this [c]ourt the opportunity to determine if a Teague analysis would make it unnecessary to reach the [issues raised by the plurality], or to consider how Teague might affect our [decision on that issue]. We should make that determination. The decision not to reach Teague because of [our decision on the other issue] does not respond to the Supreme Court's remand."); *id.* at 1518 (Kravitch, J., dissenting) ("The Supreme Court has remanded this case to us 'for reconsideration in light of

[Teague].' Yet the ... plurality opinion effectively ignores Teague. I believe that it is our duty to follow the Supreme Court's remand order and consider Teague."); *id.* at 1524 (Johnson, J., dissenting) ("[T]his case was not remanded 'in light of' a Supreme Court precedent involving [the issues the plurality rests on]. Obviously, this Court would have to conform itself to new Supreme Court precedent. However, [Teague] is not a case involving [that issue], as the plurality recognizes. Instead of 'reconsider[ing] its opinion in light of [Teague],' the plurality ignores that portion of the Supreme Court's mandate as surplusage. The Court's remand in light of Teague is not meaningless.").

What these four cases demonstrate is a general principle that remands from the Supreme Court are not meaningless. Rather, courts on remand should assume that the Supreme Court had some basis for vacating the earlier opinion. This does not mean that the court on remand must find that the precedent controls the case before it. However, it does mean, as in *White* and *Dugger*, that the court should assume that the Supreme Court would not vacate an opinion and suggest reconsideration in light of another precedent if the Court thought the grounds on which the lower court had previously decided the case were sufficient to foreclose even analysis under the new precedent.

In *Terry V*, the Second Circuit foreclosed even consideration of *Bray*, holding that the *res judicata* effects of *Terry I* were dispositive. The Supreme Court, as in *Dugger*, would not have vacated and remanded if the application of *Bray* were foreclosed for such an obvious reason. Respondents made this very *res judicata* argument in opposition to the petition for a writ of certiorari which the Court granted in *Pearson I*. *See* Respondents Brief In Opposition, 92-282. By holding that *Terry I* rendered *Bray*

completely inapposite, the lower federal courts disobeyed a clear mandate of the Supreme Court.

Therefore, the award of attorneys' fees under 42 U.S.C. § 1988 should be vacated, as both contrary to the dictates of *Bray* and *Pearson I*, and as unconstitutional insofar as they depend upon the FACE Act.

II. There Is A Split In The Circuits Between The Second And Eleventh Circuits. The Purportedly Civil Contempt Fines And Penalties Issued By The District Court With A Purported "Purge" Provision Are Criminal In Nature

A. The Purported "Purge Provisions" Cannot Transform The Criminal Contempt Penalties Into Civil Contempt Penalties

The Court in *Bagwell*, stated that contempt fines are civil in nature if they "coerce [ ] the defendant into compliance with the court's order, or compensate the complainant..." 512 U.S. at 829, 114 S. Ct. at 2558. However, if the fines are punitive, they are considered criminal. *Id.* *Bagwell* states that non-compensatory fines can be considered civil if the contemnor is afforded an opportunity to purge. *Id.* However, simply labeling something a "purge provision" will not necessarily transform a criminal contempt fine into a civil fine. The "labels affixed" to the relief "are not controlling" but, rather "the critical feature" is "the character of the relief." *Hicks v. Feiock*, 485 U.S. 624, 631, 108 S. Ct. 1423, 1429 (1988).

The order reinstating the judgments contains such purported "purge provisions." (See Affirmation, Publication, Certification of Publication and Procedures Sections of the district court's March 21, 1997 Order) (Appendix D: 62a-

63a). However, no "purge provision" can be added at this late date to retroactively transform these criminal contempt penalties into civil contempt penalties. First, the injunctive orders are prohibitory in nature and not mandatory and the defendants are not engaged in any ongoing violation and have not for over eight years. There is simply nothing to purge. Thus, no coercive impact can be created by these after the fact "purge provisions." Second, the modified "purge provisions" are no more than an attempt to extort from the Petitioners' admissions which violate their moral consciences and self-inflicted humiliation by publicly confessing wrongdoing."

The purge provision adopted by the district court does not condition removal of the fines on compliance with the order. Rather, it conditions removal of the fines on vindication of the district court's authority. It is not alleged that respondents have violated the court's order in over seven years. Not satisfied with this, however, the district court wants respondents to promise to continue to obey the order in the future. The only reason the district court could desire the respondents to take this step is to satisfy the court that respondents truly respect the court's ability to impose the order. Petitions are not given the choice to obey the order, rather they must choose between paying the content of fines or publicly announcing their respect for the district courts order.

Discussing a similar "purge provision", the Eleventh Circuit stated in *In re E.I. Dupont De Nemours*, 99 F.3d 363, 369 n.6 (11th Cir. 1996):

> The Appellees claim that the $1 million and $100 million sanctions contained in the third part of the contempt order are civil in nature because, even though determinate, DuPont

> was free to purge them by taking out ads in several newspapers confessing wrongdoing. But this publication option was itself neither compensatory nor coercive, but instead was punitive in nature. When a party must choose between two sanctions that are both punitive in nature, the character of the ultimate relief will necessarily be punitive.

That the district court forged such an identical punitively "purge provision" in this case, after respondents had obeyed the order for such a lengthy period of time, is evidence of the true purpose behind the provision this Court confronts. A reasonable purge provision would already have excused petitioners' fines as a result of their lawful behavior over the past decade.

The Second Circuit's argument, *see Terry V*, 159 F.3d at 94 (Appendix A: 16a), that the purge provision in the instant case is similar to that found in *United States v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677 (1947), is mistaken. In that case, the union had informed its members of its intention to terminate a labor agreement. *See id.*, 330 U.S. at 265. After ordering the union to comply with the agreement, the court also ordered the union, on pain of civil contempt penalties, to inform its members of its intent to comply, so as to ensure the cooperation of individual union members. *See id.*, 330 U.S. at 305, 307 (noting that full compliance with the order could only be achieved in this way, and "[p]unishment in this case is for that which the defendants had done prior to imposition of the judgment ..., coupled with a coercive imposition upon the defendant to compel obedience with the court's outstanding order."). However, the district court requires petitioners to announce generally their intent to obey the order, despite the lack of

any indication that petitioners' fellow travelers are inclined to disobey the order absent such an announcement, so as to vindicate the court's authority to impose such an order.

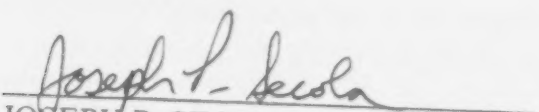
Therefore, this Court should vacate the contempt fines, and order the Second Circuit to enter judgment consistent with *Bagwell*. This court should also vacate the attorneys' fees which it granted respondents for prosecuting the contempt motion.

CONCLUSION

For the foregoing reasons the Petitioners pray that this Petition be granted and that the contempt judgments assessing $350,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be vacated *and remanded* for further proceedings consistent with this Court's decision.

Petitioners further pray that this Court either *remand* with instructions to the court of appeals to vacate and vacate the award of attorneys' fees under 42 U.S.C. § 1988 associated with any litigation of the federal claims under 42 U.S.C. § 1985(3), against the defendants Petitioners, pursuant to this Court's previous mandates in *Pearson* or vacate and remand for further proceedings consistent with this Court's decision in *Johnson v. Haddix*, 98-262.

Respectfully submitted,



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Dated: New York, New York
March 8, 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al,
Plaintiffs-Appellees,
City of New York,
Plaintiff-Intervenor-Appellee,
v.
Randall A. TERRY, Operation Rescue, et al,
Defendants-Appellants,
B.O.R.N., Jesse Lee, Joseph Foreman, et al,
Respondents-Appellants,
Reverend James P. Lisante, et al, Defendants.

No. 477, Docket No. 97-7217.

Argued Nov. 19, 1997.

Decided Oct. 21, 1998.

Before: KEARSE, LEVAL, and FRIEDMAN*, Circuit Judges.

LEVAL, Circuit Judge:

Plaintiffs are a group of women's organizations, health care clinics, and abortion providers who brought a civil rights action against an anti-abortion organization, its leader, and anti-abortion protestors. The district court, which had earlier enjoined defendants from engaging in various actions in violation of plaintiffs' rights and had found the defendants in contempt for violation of the injunction, granted plaintiffs' motion to reinstate the earlier finding of contempt, and imposed coercive fines. The fines were subject to an opportunity for defendants to purge themselves of contempt and be relieved of the obligation to pay the fines by obeying the injunction and publicly declaring their intention to comply with the injunction. The court also granted plaintiffs' motion to reinstate its award of attorney's fees to plaintiffs for prevailing on their contempt motions and civil rights claim.

On appeal from the finding of contempt with coercive fines and the award of attorney's fees, defendants argue that (1) the contempt sanctions should be vacated for mootness because defendants have not violated the injunctions in over seven years or because of the enactment of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (the "FACE Act"); (2) the fines, notwithstanding the opportunity to purge, are a criminal penalty that may not lawfully be imposed because defendants were not afforded procedural protections required by the Constitution for criminal proceedings; (3) attorney's

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* The Honorable Daniel M. Friedman, Senior Circuit Judge for the Federal Circuit, Washington, D.C., sitting by designation.

fees awarded to plaintiffs for prosecuting contempt motions were improperly reinstated; (4) attorney's fees awarded to plaintiffs under 42 U.S.C. § 1988 were improperly reinstated; and (5) the motion for reinstatement of sanctions was time-barred.

We affirm.

BACKGROUND

Plaintiffs brought this action in the Supreme Court of New York on April 25, 1988, seeking declaratory and injunctive relief to restrain defendants[1] from blocking access to medical facilities that provided abortions during a series of protests planned for April 30 through May 7, 1988. The complaint alleged eight separate causes of action: violations of New York Civil Rights Law § 40-c and New York Executive Law § 296; public nuisance; interference with the business of medical facilities; trespass; infliction of emotional harm on patients and employees of medical facilities; tortious harassment of patients and employees of medical facilities; false imprisonment of patients and employees of medical facilities; and conspiracy to deny women seeking abortion or family planning services the equal protection of the laws and equal privileges and immunities, in violation of 42 U.S.C. § 1985(3).

On April 28, 1988, Justice Cahn of the Supreme Court issued a temporary restraining order that did not expressly enjoin defendants from blocking access to abortion clinics.

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[1] Unless otherwise indicated, "defendants" refers to defendants-appellants, non-party respondents-appellants, and defendants who did not appeal.

On May 2, 1988, following a demonstration outside a Manhattan abortion clinic, Justice Cahn issued a second temporary restraining order that enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988." The following day, May 3, defendant Terry and other protestors violated the order during a demonstration outside a Queens abortion clinic. At a hearing that afternoon before Justice Cahn, defendants removed to federal district court.

On May 4, 1988, the district court adopted a modified version of Justice Cahn's second temporary restraining order. The new temporary restraining order (the "TRO") included coercive sanctions of $25,000 for each day defendants violated the order and required defendants to notify the City of New York in advance of the location of any demonstrations. After defendants violated this TRO on May 5-6, 1988, plaintiffs sought contempt sanctions in accordance with the TRO. The district court adjudged Operation Rescue and Terry in civil contempt of the May 4 Order held them jointly and severally liable for a $50,000 fine. *See New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324, 1338 (S.D.N.Y.1988), *aff'd as modified*, 886 F.2d 1339 (2d Cir.1989) ("*Terry I*"), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990).

In response to defendants' publicized plan to carry out more protests on October 28, 29, and 31, 1988, plaintiffs moved to modify the TRO to cover those dates. The district court granted plaintiffs' motion and converted the TRO into a preliminary injunction. In spite of the injunction, on October 29, 1988, hundreds of Operation Rescue protestors blocked access to clinics at two covered locations.

When defendants threatened to block access again on January 12-14, 1989, plaintiffs moved for summary judgment on their claims under 42 U.S.C. § 1985(3) and New York law, and for a Permanent Injunction. The district court granted summary judgment for plaintiffs on their § 1985(3) claim. *New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. 1247, 1258-60 (S.D.N.Y.1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir.1989) ("*Terry I*"), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990). The judgment permanently enjoined defendants from

> trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties [and] physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties.

Terry I, 886 F.2d at 1345 n. 1, *aff'g* 704 F.Supp. at 1263. The Permanent Injunction also established a schedule of prospective coercive civil sanctions for future violations, providing that

> the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation ... each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine ... each

> contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order.

Id. We affirmed summary judgment for plaintiffs and the Permanent Injunction. *Terry I*, 886 F.2d at 1357-64.

In subsequent civil contempt proceedings, the district court found that defendants had violated the TRO, preliminary injunction, and Permanent Injunction ("the district court's orders") on four separate dates: May 6, 1988, October 29, 1988, and January 13-14, 1989. *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. 388, 398 (S.D.N.Y.1990). The court fined defendant Terry and Operation Rescue, jointly and severally, $100,000 and fined defendant Thomas Herlihy $25,000. Several non-party respondents who acted in concert with defendants[2] were also fined, including B.O.R.N. ($25,000), Jesse Lee ($100,000), Joseph Foreman ($25,000), Michael McMonagle ($25,000), Jeff White ($25,000), Michael La Penna ($25,000), Florence Talluto ($50,000), Adelle Nathanson ($25,000), and Robert Pearson ($25,000). *See* 732 F.Supp. at 413-14.

The district court also awarded plaintiffs attorney's fees for prevailing on their contempt motions and their civil rights claim. *See New York State Nat'l Org. for Women v. Terry*, 737 F.Supp. 1350, 1363, 1367 (S.D.N.Y.1990). We affirmed the contempt judgments and attorney's fees against

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[2] Under Fed.R.Civ.P. 65(d), civil contempt sanctions may be assessed against nonparties with actual notice of the order who acted in concert with defendants in violating an order.

all defendants and all but two[3] non-party respondents. *See New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 401 (2d Cir.1992) ("*Terry II*").

Defendants then petitioned for a writ of certiorari based on the Supreme Court's grant of certiorari in *Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991), a case involving similar facts. Following its decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), the Supreme Court granted certiorari, vacated the contempt fines and attorney's fees in a memorandum decision, and remanded the case to the Second Circuit for further consideration. *See Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993). On remand, we reinstated the contempt fines and attorney's fees, stating that applications for relief in light of *Bray* should be addressed in the first instance to the district court. *See New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351, 1352 (2d Cir.1993) ("*Terry III*").

Defendants again sought a writ of certiorari on the ground that the contempt fines were criminal in nature (and could be imposed only with criminal procedural protections) and presented the same issue as was before the Supreme Court in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) ("*Bagwell*"). Certiorari was granted, and the decision of the Court of Appeals was vacated and remanded for further consideration in light of *Bagwell*. *See Pearson v. Planned Parenthood Margaret Sanger Clinic*

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[3] Contempt judgments against non-party respondents Florence Talluto and Michael LaPenna were reversed for lack of personal jurisdiction. *See Terry II*, 961 F.2d at 400.

(Manhattan), 512 U.S. 1249, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994).

On remand, we vacated the contempt fines and remanded the case for further proceedings in light of *Bagwell*. *See New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794, 796, 797 (2d Cir.1994) ("*Terry IV*"). We also vacated plaintiffs' award of attorney's fees for the contempt motions, and instructed the district court to reconsider in light of *Bray v. Alexandria Women's Health*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), its award of attorney's fees under 42 U.S.C. § 1988. *See Terry IV*, 41 F.3d at 797.

Plaintiffs then moved the district court for orders that would reinstate the contempt findings and the coercive fines, subject to an opportunity for defendants to purge themselves. Plaintiffs also sought attorney's fees. The district court rejected defendants' contention that the case had been rendered moot by the absence of violations of the Permanent Injunction during the previous seven years or by the enactment of the FACE Act, 18 U.S.C. § 248. *See New York State Nat'l Org. for Women v. Terry*, 952 F.Supp. 1033, 1039 (S.D.N.Y.1997). The court reinstated the fines. It ordered "coercive civil penalties" payable to the United States, subject to a "purge provision" under which defendants could avoid both the contempt holding and the penalties if they obeyed the injunction and, within sixty days, published an Affirmation of intent to abide by its terms. *See Id.* at 1046; Order Amending and Reinstating Judgments, March 21, 1997, *New York State Nat'l Org. for Women v. Terry*, 952 F.Supp. 1033 (S.D.N.Y.1997), at 2-3. The court also reinstated its award of attorney's fees to plaintiffs for prosecuting contempt motions and for prevailing on their

civil rights claim. *See* 952 F.Supp. at 1044, 1046. Defendants appeal.

DISCUSSION

I. Mootness

Defendants contend that the case should have been dismissed as moot on the ground that no violations of the Permanent Injunctions have occurred in over seven years and that recent federal legislation protecting abortion clinics, the FACE Act, 18 U.S.C. § 248, renders the Permanent Injunction unnecessary.

Mootness arises when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). An originally justiciable issue may abate if "(1) it can be said with assurance that there is no reasonable expectation … that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (citations and internal quotation marks omitted). The burden to demonstrate mootness "is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). A litigant must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306 (1987).

Defendants have not met their burden under this test. Although defendants have not violated the Permanent Injunction in "over seven years", the violations were

persistent and ceased only when the district court imposed significant coercive fines. Cf. 732 F.Supp. at 413-14 (imposing fines). Voluntary cessation of illegal conduct does not necessarily render the controversy moot. *See W.T. Grant Co.*, 345 U.S. at 632, 73 S.Ct. at 897; *see also United States v. Generix Drug Corp.*, 460 U.S. 453, 456, 103 S.Ct. 1298, 1300, 75 L.Ed.2d 198 (1983); *Government of Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 285 (3d Cir.1983). In particular, voluntary cessation of misconduct does not engender mootness where the cessation resulted from a coercive order and a threat of sanctions. *See Vitek v. Jones*, 445 U.S. 480, 487, 100 S.Ct. 1254, 1260, 63 L.Ed.2d 552 (1980); *see also Allee v. Medrano*, 416 U.S. 802, 810, 94 S.Ct. 2191, 2198, 40 L.Ed.2d 566 (1974). The mere passage of time since the previous violation does not compel the conclusion that the injunction and contempt fines are no longer necessary; it is equally possible that the defendants' compliance with the district court's orders is attributable to the penalties they face in the event of violation. Moreover, defendants have failed to state an intention to abide by the Permanent Injunction in the future. *See* 952 F.Supp. at 1039. Thus, it is by no means absolutely clear that defendants' violations of the district court's orders "could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66, 108 S.Ct. at 386. The record offers no assurance that, if sanctions were lifted, the defendants would not "return to [their] old ways" of violating the court's orders. *W.T. Grant Co.*, 345 U.S. at 632, 73 S.Ct. at 897. Indeed, plaintiffs assert they have evidence showing that abortion clinics in New York continue to experience frequent physical obstruction of patients' access. *See* 952 F.Supp. at 1039.

Defendants rely on *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), but that case is inapposite. In Davis, a district court permanently

enjoined the use of a racially discriminatory hiring examination in a county Fire Department, and the county sought dismissal on mootness grounds. The Supreme Court held the case was moot because there was no reasonable expectation that the county would ever use an invalidated civil service exam where the county had considered using the exam only because there had been a temporary shortage of firefighters -- a unique situation that was no longer present and was unlikely to recur. *See Id.* at 632, 99 S.Ct. at 1383. Moreover, there was no suggestion by either party that the county would attempt to use the invalidated examination in the event the injunction was dissolved. *See Id.* at 632-33, 99 S.Ct. at 1383-84. Here, by contrast, the situation that prompted the invalidated protest activity--women seeking abortions--is ongoing and will continue indefinitely. Thus, it is not absolutely clear that violations are unlikely to recur. *See Gwaltney*, 484 U.S. at 66, 108 S.Ct. at 386.

Defendants also contend that the passage of the FACE Act, 18 U.S.C. § 248, which forbids the types of activities that the district court enjoined, also moots the action. It does not for at least two reasons. The defendants engaged in the conduct that justified the finding of contempt notwithstanding an injunction forbidding it. There is no reason to suppose that the defendants are more likely to obey a statute than they were to obey the court's order. Furthermore, the maintenance of the action is justified by the fact that defendants were alleged (and ultimately found) to have violated plaintiffs' rights. There was a viable case in controversy when the suit was initiated. An initially ripe case or controversy does not cease to be justiciable merely because the defendants stop violating the plaintiffs' rights.

It cannot be said that by reason of the enactment of the FACE Act, "interim relief or events have completely and

irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631, 99 S.Ct. at 1383.

II. Motion for Reinstatement of Contempt Fines

In *Terry IV* we vacated, in light of *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) ("*Bagwell*"), the district court's contempt fines, which were imposed without constitutional criminal procedural protections, and which did not include an opportunity for defendants to purge their contempts. *See Terry IV*, 41 F.3d 794, 797 (2d Cir.1994). In response to our remand instructions, *see Id.*, the district court reinstated the fines, subject to an opportunity to purge. We now must determine if the reinstated fines are consistent with *Bagwell*, which held that defendants were entitled to a criminal jury trial where defendants had "no opportunity to purge [the fines] once imposed," and the circumstances led the Court to conclude that the purpose of the fines was criminal punishment. *See* 512 U.S. at 837-38, 114 S.Ct. at 2562. Defendants argue that the fines, even though subject to a purge provision, are nonetheless a punishment.

Bagwell involved fines levied against a labor union for violations of an injunction, which prohibited the union from, among other things,

> obstructing ingress and egress to company facilities, throwing objects at and physically threatening company employees, placing tire-damaging "jackrocks" on roads used by company vehicles, and picketing with more than a specified number of people at designated sites.

Id. at 823, 114 S.Ct. at 2555. The injunction also required the union to "take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all violations to the court." *Id.* at 823-24, 114 S.Ct. at 2555. After a series of non-jury contempt proceedings, at which violations were proven beyond reasonable doubt, the trial court levied approximately $12 million in compensatory fines[4] payable to the aggrieved parties and $52 million in noncompensatory fines payable to the Commonwealth of Virginia and the two counties most seriously affected by the unlawful activity. *Id.* at 824, 114 S.Ct. at 2555-56.

Whether a contempt is criminal or civil turns on the character and purpose of the sanction. Civil contempt fines seek one of two objectives. One is coercion-to force the contemnor to conform his conduct to the court's order. The second is compensation. Where the contumacious conduct has caused injury to the beneficiary of the court's order, a civil fine may be imposed on the contemnor to compensate the victim for the loss or harm caused by the unlawful conduct. Criminal fines, by contrast, are intended primarily to punish the contemnor and vindicate the authority of the court. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-42, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911), *cited in Bagwell*, 512 U.S. at 827-28, 114 S.Ct. at 2557; *see also Penfield Co. v. Securities & Exchange Comm'n*, 330 U.S. 585, 590, 67-S.Ct. 918, 921, 91 L.Ed. 1117 (1947).

Several factors contributed to the Court's conclusion that the noncompensatory fines in *Bagwell* were criminal in purpose and could be imposed only through a criminal jury trial. First, the trial court's order imposing the fines included no purge provision enabling defendants to avoid fines by

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[4] Compensatory fines paid to the aggrieved party for losses sustained are civil. *See Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2558.

compliance with the court's order. *See Bagwell*, 512 U.S. at 837, 114 S.Ct. at 2562; *Mackler Productions, Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir.1998). In reaching this conclusion, the Court drew on a line of cases in which it had found sanctions to be civil where "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus 'carries the keys of his prison in his own pocket.'" *Bagwell*, 512 U.S. at 828, 114 S.Ct. at 2558, *quoting Gompers*, 221 U.S. at 442, 31 S.Ct. at 498; *see also United States v. United Mine Workers*, 330 U.S. 258, 305, 67 S.Ct. 677, 702, 91 L.Ed. 884 (1947) (stating that a fine would be coercive, rather than punitive, where it was "condition[ed] on the defendant's failure to purge itself within a reasonable time"); *Hicks v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988) ("a fine that would be payable to the court is … remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order."); *Shillitani v. United States*, 384 U.S. 364, 370-71, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (noting that when a court confines until compliance a witness refusing to testify at judicial proceedings, the "conditional nature of the imprisonment -- based entirely upon the contemnor's continued defiance- justifies holding civil contempt proceedings absent the safeguards of indictment and jury"). The absence of a purge provision was significant because it suggested the trial court's objective was not to coerce but to punish. A purge provision permits the contemnor to escape a fine by conforming his conduct to the court's order or by declaring an intention to do so. The absence of a purge provision means that the fine will be imposed regardless of reform and commitment to obey. A fine without a purge provision therefore suggests an intention to punish past misconduct rather than to insure future lawfulness.

Other factors that helped persuade the *Bagwell* Court that the $52 million in fines in that case were of a punitive, criminal character were that (1) they were not "calibrate[d]" to damages caused by the contumacious activities, 512 U.S. at 834, 114 S.Ct. at 2561, (2) that they were payable to the Commonwealth and the counties, 512 U.S. at 824-25, 114 S.Ct. at 2556, rather than to the injured party, and (3) that they were extremely large, amounting to $52 million, 512 U.S. at 837-38 & n. 5, 114 S.Ct. at 2562 & n. 5. *See Mackler*, 146 F.3d at 129. The failure to calibrate the fines to the injuries inflicted on the victims of the contumacious conduct rebutted the inference that the fines were designed to compensate the victims. Similarly, the fact that the $52 million in fines in *Bagwell* were payable to the Commonwealth of Virginia and the counties, rather than to the victims, made unmistakably clear that their purpose was not to compensate. The enormous size of *Bagwell* fines, especially where all other factors pointed to a punitive, rather than a coercive or compensatory purpose, emphasized the need for the protection of the defendant in the adjudication process, reinforcing the conclusion that criminal procedures were required.

The consideration of these factors in the context of this case leads to the conclusion that these fines are civil in nature, because their purpose is coercion. The district court's modified contempt order includes a purge provision that excuses defendants from paying contempt fines if, within 60 days from the date of the court's order, they file and publish an affirmation of their intent to abide by the Permanent Injunction. *See Order Amending and Reinstating Judgments, New York State Nat'l Organization for Women v. Terry*, 952 F.Supp. 1033 (S.D.N.Y.1997), at 2-3. Thus, the district court's modified order gives defendants an "opportunity to purge [the fines] once imposed." *Bagwell*,

512 U.S. at 837, 114 S.Ct. at 2562; *see also People v. Operation Rescue National*, 80 F.3d 64, 68 n. 7 (2d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 85, 136 L.Ed.2d 42 (1996) ("Under *Bagwell*, a noncompensatory fine is civil, and thus may ordinarily be imposed in the absence of a criminal trial 'only if the contemnor is afforded an opportunity to purge.'").

This purge provision is similar to the provision in *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) ("*United Mine Workers*"), that the Supreme Court treated as a model civil fine in *Bagwell*. *See Bagwell*, 512 U.S. at 830 & n. 4, 114 S.Ct. at 2558 & n. 4 (noting, in reference to purge provision in *United Mine Workers*, that "the conduct required of the union to purge the suspended fine was relatively discrete"); *Id.* at 829, 114 S.Ct. at 2558 (*United* "*Mine Workers* ... held that fixed fines also may be considered purgable and civil when imposed and suspended pending future compliance."); *see generally id.* at 829-30, 114 S.Ct. at 2558-59. In *United Mine Workers*, a union was found guilty beyond reasonable doubt of both criminal and civil contempt and was fined $3.5 million for violating a temporary order that restrained it from terminating the 1946 Krug-Lewis labor agreement[5], encouraging miners to interfere with the operation of the mines, and interfering with the jurisdiction of the court. *United Mine Workers*, 330 U.S. at 266-67, 269, 67 S.Ct. at 682-84. The Court converted $2.8 million of the fine into a coercive civil fine with a purge provision. *See id.* at 305, 67 S.Ct. at 702; *see also Bagwell*, 512 U.S. at 830, 114 S.Ct. at 2558 (characterizing this portion of the fine as "civil"). The

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[5] The agreement addressed relations between the United States government, which was operating a major portion of the country's bituminous coal mines, and the United Mine Workers of America. *United Mine Workers*, 330 U.S. at 262-63, 67 S.Ct. at 680-81.

union could avoid the fine if, within five days of the issuance of the mandate, it showed that it had fully complied with the district court's temporary restraining order and preliminary injunction by (1) withdrawing unconditionally its notice of termination of the Krug-Lewis agreement and any other notice implying the agreement was not in full force, and (2) notifying its members of the withdrawal of these notices. *United Mine Workers*, 330 U.S. at 305, 67 S.Ct. at 702. Similarly, the purge provision in the instant case enables contemnors to avoid their fines if they formally affirm their intention to abide by the Permanent Injunction and publish that intention. The presence of the purge provision tends strongly to support the conclusion that the fines are coercive rather than punitive, and thus civil rather than criminal. The inclusion of the purge provision means that, if the defendants conform their conduct, they escape all obligation to pay the fines. It is therefore clear that punishment for past wrongdoing is not the objective of the fines, but rather coercion of the defendants to conform their conduct to the court's order.

To be sure, that the fines are not calibrated to the harm caused by the defendants' conduct, and are payable to the United States, argues against a conclusion that the fines are intended as compensatory; but this is irrelevant in this case because there is no contention that the fines are intended as compensatory. Those facts are no more indicative of a punitive intent than of an intent to coerce compliance. They are equally compatible with either. By its inclusion of the purge provision, the district court clearly indicated its intent that the fines serve a coercive, rather than a punitive, purpose.

And as for the size of the fines, while they are large enough to warrant concern with the adjudication process,

they are nonetheless fully consistent with the court's coercive objective. The size of these fines does not compel the conclusion that the fines are punitive and criminal in the face of the strong indications that the fines are designed to coerce compliance with the court's order, and may be escaped by defendants if they conform their conduct. We conclude they were not imposed as a punishment.

We reject defendants' argument that this imposition of fines represents a finding of criminal contempt as opposed to civil contempt for the purpose of coercion.

Defendants argue that we should follow the result of *National Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C.Cir.1994) ("*Operation Rescue*"), in which the D.C. Circuit, applying *Bagwell*, held that noncompensatory contempt fines were criminal, and that defendants were entitled to the protections of criminal procedure, where the contempts involved out-of-court disobedience to a complex injunction. 37 F.3d at 660-61. There is a crucial difference, however. The order imposing contempt fines in *Operation Rescue* did not afford contemnors "an opportunity to purge," *Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2558. *See* 37 F.3d at 649-50, 661-63.

Defendants also argue that the purge provision is punitive and therefore criminal in nature because it forces defendants to humiliate themselves by publicly confessing wrongdoing. Defendants cite an Eleventh Circuit case in which a purge provision that allowed contemnors to avoid fixed fines by "taking out ads in several newspapers confessing wrongdoing" was held to be "punitive in nature." *In re E.I. DuPont De Nemours & Company-Benlate Litigation*, 99 F.3d 363, 369 n. 6 (11th Cir.1996), *cert. denied*, __ U.S. __, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997). This order does not require a confession of wrongdoing. The

publication of the Affirmation and Explanatory Letter requires statement of an indisputable fact -- that "the contemnor has been held in contempt for violating [district court orders]," coupled with statement that "the contemnor has agreed to comply with the Permanent Injunction in the future." *See* Order Amending and Reinstating Judgments, at 2. The holding of *DuPont* is not pertinent.

III. Attorney's Fees for Prosecuting Contempt Motions

When we vacated the district court's original contempt fines as inconsistent with *Bagwell*, we also vacated the attorney's fees awarded to plaintiffs for prosecuting contempt motions. *Terry IV*, 41 F.3d at 797 (2d Cir.1994). The district court reinstated the fees upon its reinstatement of the contempt fines. 952 F.Supp. at 1043-45.

A finding that a condemnor's misconduct was willful strongly supports granting attorney's fees and costs to the party prosecuting the contempt. *See Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir.1996); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979); *see also Hutto v. Finney*, 437 U.S. 678, 689, 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522 (1978) ("a losing litigant's bad faith may justify an allowance of fees to the prevailing party"). The district court found ample evidence that the various defendant and respondent contemnors had violated its orders willfully. *See* 732 F.Supp. at 409.

The district court's reinstatement of its award of attorney's fees to plaintiffs for its prosecution of contempt motions was within its discretion. *See Weitzman*, 98 F.3d at 720 ("[T]rial courts enjoy considerable discretion in determining the appropriate amount of attorney fees.").

IV. Attorney's Fees Under 42 U.S.C. § 1988

Under our mandate in *Terry IV*, *see* 41 F.3d at 797, the district court reconsidered, in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), its award of § 1988 attorney's fees to plaintiffs for prevailing on their civil rights claim under 42 U.S.C. § 1985(3). *See* 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of section[ ] ... 1985 ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs."). In *Bray*, the Supreme Court held that women seeking abortions did not constitute a qualifying class for the purposes of 42 U.S.C. § 1985(3). *Id.* at 269, 113 S.Ct. at 759. Because plaintiffs were not entitled to relief under § 1985(3), they were "also not entitled to attorney's fees and costs under 42 U.S.C. § 1988." *Id.* at 285, 113 S.Ct. at 767-68. The Court therefore vacated the award of fees. *Id.* The D.C. Circuit reached the same result in *Operation Rescue*, 37 F.3d at 653-54.

In this case, the district court properly reinstated plaintiffs' award of § 1988 attorney's fees. *See New York State Nat'l Org. for Women v. Terry*, 952 F.Supp. 1033, 1045-46 (S.D.N.Y.1997). *Bray* does not affect the district court's grant of judgment for plaintiffs on their § 1985(3) claims because that holding, *see* 704 F.Supp. 1247, 1263 (S.D.N.Y.1989), *aff'd Terry I*, 886 F.2d at 1359, had become

final before *Bray* was decided in 1993.[6] Thus, plaintiffs had conclusively prevailed on their claim under § 1985(3) before the Supreme Court decided *Bray*. The judgment in plaintiffs' favor under § 1985(3) was not on direct review in *Terry IV*. Because plaintiffs were prevailing parties under § 1985(3), they were entitled to an award of attorney's fees under § 1988. This was not affected by the fact that, after the judgment in their favor under § 1985(3) became final, new law declared by the Supreme Court would have made them ineligible for a new judgment under § 1985(3).

In this respect, the present case differs decisively from *Bray* and *Operation Rescue*. In those cases plaintiffs' status as prevailing parties under § 1985(3) had not yet been finally adjudicated. Those judgments were on direct review, and were subject to reversal. *See Bray*, 506 U.S. at 269, 113 S.Ct. at 759; *Operation Rescue*, 37 F.3d at 653-54. Plaintiffs in those cases were not entitled to § 1988 attorney's fees because, unlike these plaintiffs, the reversals of their judgments deprived them of their status as "prevailing parties" under § 1985(3). These plaintiffs, by contrast, were conclusively adjudicated to be prevailing parties under § 1985(3).

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[6] Defendants' petition for a writ of certiorari had already been denied. *See Terry v. New York State National Organ. Women*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990). When a writ of certiorari is denied, the judgment below stands under the doctrine of res judicata "even if a new theory of law [is] thought up." *Brown v. Allen*, 344 U.S. 443, 543, 73 S.Ct. 397, 428, 97 L.Ed. 469 (1953) (Jackson, J., concurring); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981) (res judicata consequences of a final, unappealed judgment are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case").

It is true the award of attorney's fees was on direct review when *Bray* was decided, and therefore is subject to the retroactive application of any new rule of law announced therein. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) (holding that when Supreme Court applies a new rule of federal law, that rule "must be given full retroactive effect in all cases still open on direct review"). *Bray*, however, did not announce a new rule of law with respect to awards of § 1988 attorney's fees. Its new rule related to entitlement to prevail under § 1985(3). There is a presumption that successful civil rights litigants should recover reasonable attorney's fees unless special circumstances would render such an award unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983); *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir.1985).

The district court found that there were no circumstances that would render the award of attorney's fees to the prevailing plaintiffs unjust. The district court relied in part on Congress's enactment, in response to *Bray*, of the Federal Access to Clinic Entrances Act of 1994, which substantially reestablishes the cause of action the Supreme Court had invalidated in *Bray*, *see* 18 U.S.C. § 248; H.R. Rep. 103-306, 103d Cong., 1st Sess.1993, reprinted in 1994 U.S.C.C.A.N. 699; *see also* 952 F.Supp. at 1046, and provides for awards of reasonable attorney's fees to prevailing plaintiffs aggrieved by, *inter alia*, the physical obstruction of abortion clinics. *See* 18 U.S.C. § 248(c)(1)(B). We believe this decision was within the district court's discretion.

Although, absent the new enactment, the peculiar circumstances of this case -- a final judgment confirming plaintiff's status as the prevailing party followed by a

Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed -- might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on their theory, that potential unfairness is overcome by the new act. The passage of the statute substantially undermined any claim that special circumstances render an attorney's fee award unjust in this case, for Congress has clearly provided that plaintiffs in these circumstances may prevail against illegal abortion clinic blockades and are entitled to attorney's fees. Because defendants have not shown special circumstances that would render the fees awarded in this case unjust, we find that the district court did not abuse its discretion in awarding the fees. *See* Hensley, 461 U.S. at 437, 103 S.Ct. at 1941 ("[T]he district court has discretion in determining the amount of a [§ 1988] fee award.").

We therefore affirm the district court's reinstatement of plaintiffs' § 1988 attorney's fees.[7]

V. Statute of Limitations

Plaintiffs' motion for reinstatement of the contempt fines was not time-barred. Statutes of limitations do not apply to motions on remand, which are continuations of prior proceedings. *See, e.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 351-52, 108 S.Ct. 614, 620, 98 L.Ed.2d

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[7] In connection with their argument on § 1988 attorney's fees, defendants argue that plaintiffs have "judicially admitted" that *Terry IV* retroactively applied *Bray* to reopen and collaterally attack the *Terry I* judgment. This argument relies on a misunderstanding of the nature of judicial admissions, which are statements of fact rather than legal arguments made to a court. *See* M. Graham, Federal Practice and Procedure § 6726 (Interim ed.1992); *United States v. McKeon*, 738 F.2d 26, 33 (2d. Cir.1984). Plaintiffs' statements of their theory of the case do not constitute judicial admissions.

720 (1988) (where federal question jurisdiction is lacking, it is preferable to remand rather than dismiss so that statute of limitations will not apply); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 940 (7th Cir.1992) (stating that remand does not require the district court to begin an entirely new proceeding).

Plaintiffs moved to reinstate the contempt fines after we remanded in *Terry IV*. *See Terry IV*, 41 F.3d at 797. Thus, plaintiff's motion is not time-barred.

VI. CONCLUSION

For the foregoing reasons, the district court's reinstatement of its order adjudging defendants in contempt and imposing noncompensatory contempt fines, subject to an opportunity for defendants to purge their contempt, is affirmed. The district court's reinstatement of its order awarding plaintiffs attorney's fees for prosecuting contempt motions and for prevailing on their civil rights claim, is also affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NYS National Organization for Women, et. al.,

Plaintiffs-Appellees,

v.

Randall A. Terry, et. al.,

Defendants-Appellants.

Dkt No: 97-7217

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventh day of December one thousand nine hundred and ninety-eight.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants Randall A. Terry, et al.,

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By: s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
DEC 8 1998
CAROLYN CLARK CAMPBELL, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK.

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition,
Plaintiffs,
and
City of New York, Plaintiff-Intervenor,
v.
Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s),

the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).

Jan. 17, 1997.

OPINION

ROBERT J. WARD, District Judge.

Plaintiffs move pursuant to Rule 43 of the Civil Rules for the Southern and Eastern Districts of New York ("Local Rule 43") for an order reinstating this Court's May 10, 1990 Order adjudging defendants in contempt and imposing noncompensatory sanctions on defendants, subject to an opportunity for defendants to purge themselves of contempt. In addition, plaintiffs move pursuant to 42 U.S.C. § 1988, Rule 54, Fed.R.Civ.P., and Local Rule 43 for an order reinstating this Court's July 9, 1990 Order awarding plaintiffs attorneys' fees incurred in bringing a motion for contempt and as prevailing parties on their civil rights claims. For the reasons that follow, plaintiffs' motion is granted.

BACKGROUND

Plaintiffs commenced this action in the Supreme Court of the State of New York on April 25, 1988, seeking injunctive and declaratory relief to restrain defendants from blocking access to medical facilities providing abortions. The action was brought in response to defendants' plan to carry out a week of protests, denominated "Operation Rescue," at area abortion clinics from April 30 until May 7, 1988. In furtherance of their plan, defendants attempted to prevent abortions by converging on a different clinic or facility each day. The target facility was not to be disclosed in advance.

By order to show cause, plaintiffs sought to enjoin defendants, for the duration of the planned "Operation Rescue," from obstructing access to medical facilities performing abortions in New York City and the surrounding counties. On April 28, 1988, Justice Cahn of the Supreme Court, New York County, issued a temporary restraining order ("TRO"). Having been assured by the New York City Police Department that access to the clinics would be provided, Justice Cahn did not expressly enjoin Operation Rescue from blocking access to health care facilities performing abortions.

Despite the assurances of the police department, on May 2, 1988, 503 protestors succeeded in blockading the office of a Manhattan doctor who performed abortions at 154 East 85th Street. All of the protestors were arrested. On the afternoon of May 2, 1988, Justice Cahn issued a second TRO, which enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties from May 2, 1988 to May 7, 1988."

Despite the order, defendant Randall Terry ("Terry") led a demonstration in front of a Queens facility where abortions were performed on May 3, 1988. During the demonstration, in which protestors blocked ingress into and egress from the facility, several hundred demonstrators were arrested. Later that afternoon, Justice Cahn conducted a hearing on the matter, during which defendants removed the action to this Court. A hearing before this Court was scheduled for May 4, 1988.

At that hearing, the Court decided that it would adopt and continue Justice Cahn's May 2, 1988 TRO, modifying it by (1) adding coercive sanctions of $25,000 for each day that defendants violated the terms of the order, and (2) requiring defendants to notify the City in advance of the location of any demonstrations. On May 5, 1988, Operation Rescue conducted a demonstration in front of the Women's Choice Clinic in Hicksville, Long Island, a facility where abortions are performed. Protestors sat on the sidewalk in front of the clinic, blocking ingress into and egress from the clinic for three hours.

On May 6, 1988, Operation Rescue demonstrators returned to the East 85th Street office of the doctor who performed abortions. Terry personally participated in this protest, during which demonstrators blocked access to the office. As a result of the May 6, 1988 demonstration, 320 Operation Rescue protestors, including Terry, were arrested.

Following the events of May 5 and 6, 1988, and in accordance with the TRO, plaintiffs filed a motion seeking civil contempt sanctions against Operation Rescue and Terry. By Opinion dated October 27, 1988 ("the October 27 Opinion"), the Court granted the motion, denied defendants' cross-motion to dismiss, and adjudged Terry and Operation Rescue in civil contempt of the May 4 Order for their

participation in the May 5 and May 6 demonstrations. *N.O.W. v. Terry*, 697 F.Supp. 1324, 1338 (S.D.N.Y.1988). A judgment was entered holding Terry and Operation Rescue jointly and severally liable for $50,000 in civil contempt sanctions, payable to the National Organization for Women ("N.O.W.").[1]

On October 7, 1988, plaintiffs moved to modify the Court's prior order to cover the dates October 28, 29, and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. The Court granted plaintiffs' motion after an evidentiary hearing, converting the TRO to a preliminary injunction on October 27, 1988 (the "Preliminary Injunction"). Defendants' applications to this Court and the Court of Appeals for a stay pending appeal of the Preliminary Injunction were denied. In spite of this, defendants proceeded with their plan, conducting two demonstrations on October 29, 1988 within the geographical area covered by the Preliminary Injunction.

One demonstration was held at the Women's Pavilion medical clinic in Dobbs Ferry, New York. Between 8 a.m. and 12:15 p.m., 250 Operation Rescue protestors blocked ingress into and egress from the clinic. During those same hours, 130 protestors blocked access to the Women's Pavilion clinic in Deer Park, New York. All 130 participants in the Deer Park blockade were arrested. Both clinics provide abortions and family planning counseling.

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[1] This order was ultimately modified by the Second Circuit, which directed that the sanctions be paid into Court "[i]nasmuch as no proof of loss was offered on behalf of N.O.W., no evidence of actual injury due to Operation Rescue's activities was shown and there was no evidence that awarding the contempt sanction to N.O.W. would have additional coercive effect on defendant's behavior." *N.O.W. v. Terry*, 886 F.2d 1339, 1354 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990).

In retaliation for the Court's October 27, 1988 Opinion, Operation Rescue organized blockades of abortion providers in the New York City area from January 12 through January 14, 1989. *N.O.W. v. Terry*, 732 F.Supp. 388, 395 (S.D.N.Y.1990). Upon learning of Operation Rescue's plan, plaintiffs moved the Court for summary judgment on their claims under 42 U.S.C. § 1985(3) and state law, and for a permanent injunction on December 21, 1988. The Court heard oral argument on January 6, 1989. On January 10, 1989, the Court entered a permanent injunction ("the Permanent Injunction"), enjoining defendants from, among other things,

> trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties [and] physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties.

The injunction contained provisions limiting defendants' First Amendment right to sidewalk counsel. It also provided that defendants would be fined for failing to give the City of New York advance notice of any demonstrations.

In addition, the Permanent Injunction set out a schedule of sanctions for future violations. The Court ordered that

> the failure to comply with th[e] Order by any Operation Rescue participant with actual notice of the provisions of th[e] Order shall

> subject him or her to civil damages of $25,000 per day for the first violation of th[e] Order; and ... further ordered that each successive violation of th[e] Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and ... further ordered that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and ... further ordered that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of th[e] Order ...

In crafting the Permanent Injunction, the Court reasoned that "[i]n view of defendants' past non-compliance with the Court's injunctive orders and their stated intention to block access to clinics without regard to any order issued by the Court, the Court considers it necessary to impose prospective civil contempt penalties in order to enforce compliance with its injunction." *N.O.W. v. Terry*, 704 F.Supp. 1247, 1263 (S.D.N.Y.1989). The January 20, 1989 Opinion of this Court granting plaintiffs summary judgment and permanent injunctive relief was upheld by the Second Circuit in a decision dated September 20, 1989. *N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) ("*Terry I*").[2]

In subsequent contempt proceedings, defendants and several non-party respondents acting in concert with the

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[2] As part of this consolidated appeal, the Second Circuit also affirmed earlier interlocutory decisions imposing contempt sanctions against defendants Terry and Operation Rescue, and imposing discovery sanctions on Terry. *N.O.W. v. Terry*, 886 F.2d at 1353.

defendants[3] were found to have violated the Permanent Injunction, and the TRO and preliminary injunction that preceded it, by blockading facilities where abortions were performed on four separate dates: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. *N.O.W. v. Terry*, 732 F.Supp. 388, 398 (S.D.N.Y.1990). The undisputed facts established, by clear and convincing evidence, that each of the following defendants and non-party respondents had violated the Permanent Injunction and/or the injunctive orders that preceded it. *Id.* They were held in civil contempt and the following sanctions were levied against them:

Defendant	Contumacious Behavior and Sanction
Randall Terry and Operation Rescue	and A total of $100,000 in sanctions, joint severally, derived as follows: (1) $25,000 for the demonstrations in violation of the October 27 Order at the Women's Pavilion Clinics in Deer Park and Dobbs Ferry, New York on October 29, 1988; (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13,1989; and (3) $50,000 for the demonstrations in violation of the Permanent Injunction at six New York City area clinics on January 14, 1989.
Thomas Herlihy	Fined $25,000 for violating the May 4, 1988 Order by participating in a May 6, 1988 demonstration and blocking access to the office of a physician who performed abortions.

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[3] Under Rule 65(d), Fed.R.Civ.P., civil contempt sanctions may be assessed against nonparties who had actual notice of the order in effect at the time in question and who acted in concert with defendants in violating the order. In this Opinion, defendants and the non-party respondents adjudged in contempt will at times be collectively referred to as "defendants."

Defendant	Contumacious Behavior and Sanction
Non-Party Respondent	Contumacious Behavior and Sanction
B.O.R.N.	Fined $25,000 for violating the October 27, 1988 Order by sponsoring and participating in demonstrations in Deer Park and Dobbs Ferry, New York on October 29, 1988.
Jesse Lee	Fined a total of $100,000, derived as follows: (1) $25,000 for the demonstration in Dobbs Ferry, New York on October 29, 1988 in violation of the October 27, 1988 Order; (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989; (3) $50,000 for the demonstration in violation of the Permanent Injunction at the VIP Medical Associates Clinic in Manhattan on January 14, 1989.
Joseph Foreman, Michael McMonagle, and Jeff White	Each fined $25,000 for their participation in the January 13, 1989 demonstration at the Margaret Sanger Clinic in violation of the Permanent Injunction.
Michael La Penna	Fined $25,000 for blocking access to the Women's Pavilion Clinic in Deer Park, New York on October 29, 1988 in violation of the October 27, 1988 Order.
Florence Talluto	Fined $50,000 derived as follows: (1) $25,000 for blocking access to the V.I.P. Clinic in Manhattan on January 1 14, 1989 in violation of the Permanent Injunction; and (2) $25,000 for her participation in the Deer Park demonstration on October 29, 1988 in violation of the October 27, 1988 Order.
Adelle Nathanson	Fined $25,000 for blocking access to the Women's Pavilion Clinic in Dobbs Ferry, New York on October 29, 1988 in violation of the October 27,

Defendant	Contumacious Behavior and Sanction
	1988 Order.
Robert Pearson	Fined $25,000 for blocking access to the V.I.P. Clinic in Manhattan on January 14, 1989 in violation of the Permanent Injunction.

In a later decision, the Court awarded plaintiffs attorneys' fees as prevailing parties on their civil rights claim and for prosecuting the motion for contempt. *N.O.W. v. Terry*, 737 F.Supp. 1350 (S.D.N.Y.1990). In a consolidated appeal, all but two of the judgments of contempt[4] and the award of attorneys' fees were affirmed by the Second Circuit. *N.O.W. v. Terry*, 961 F.2d 390 (2d Cir.1992) ("*Terry II*").

Defendants petitioned for a writ of certiorari based on the Supreme Court's grant of certiorari in *Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). The Supreme Court granted certiorari and vacated the judgment in a memorandum decision, remanding the case to the Court of Appeals for the Second Circuit for further consideration in light of *Bray*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993).

On remand, the Court of Appeals reinstated its initial judgment, reasoning that "reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court." *N.O.W. v. Terry*, 996

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[4] The judgments of contempt against respondents Talluto and La Penna were reversed on the ground that this Court lacked jurisdiction over them due to improper service of the Order to Show Cause. *N.O.W. v. Terry*, 961 F.2d at 400.

F.2d 1351, 1352 (2d Cir.1993) ("*Terry III*"). Again appellants sought a writ of certiorari, arguing that the contempt sanctions imposed in this case were criminal in nature and presented the same issue which was then before the Supreme Court in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). In their petition for a writ of certiorari, appellants also reiterated their argument that the Supreme Court's decision in *Bray* required reversal of this Court's judgment in *Terry I*. Certiorari was granted, and again the decision of the Court of Appeals was vacated and remanded, this time, for further consideration in light of *Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 512 U.S. 1249, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994). In its second memorandum decision, the Supreme Court did not discuss appellants' request for reversal of *Terry I* based upon *Bray*.

On remand, a panel of the Court of Appeals for the Second Circuit vacated this Court's levy of noncompensatory fines[5] and remanded the case for further proceedings consistent with the Supreme Court's decision in *Bagwell. N.O.W. v. Terry*, 41 F.3d 794 (2d Cir.1994) ("*Terry IV*"). Since it had vacated the judgments of contempt, the Second Circuit likewise vacated the award of attorneys' fees for prosecuting the motion for contempt. *Id.* at 797. Despite the Supreme Court's silence on this point, the panel also instructed this Court to reconsider its award of attorneys'

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5 This Court's decision is reported at 732 F.Supp. 388 (S.D.N.Y.1990).

fees under 42 U.S.C. § 1988 in light of *Bray*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Id.*[6]

Accordingly, plaintiffs now move the Court: 1) for an order, pursuant to Local Rule 43, reinstating the Court's May 10, 1990 Order adjudging defendants in contempt and imposing noncompensatory sanctions on defendants, subject to an opportunity for defendants to purge themselves of contempt; and 2) for an order pursuant to 42 U.S.C. § 1988, Rule 54, Fed.R.Civ.P., and Local Rule 43, reinstating this Court's July 9, 1990 Order awarding plaintiffs attorneys' fees for bringing a motion for contempt and as prevailing parties on their civil rights claim.

DISCUSSION

The prospective noncompensatory fines levied against defendants can be reinstated only if they comport with the restrictions on noncompensatory sanctions for indirect contempts set out by the Supreme Court in *Bagwell*. Because the Court directs the parties to settle on notice a Modified Permanent Injunction that includes a provision whereby contemnors may purge themselves of a contempt of the injunction, bringing the schedule of prospective sanctions into conformity with *Bagwell*, the fines will be reinstated. Since the fines are hereby reinstated, the award of attorneys' fees for prosecution of the contempt motion will stand. Additionally, the Court finds that *Bray* does not require that the award of attorneys' fees to plaintiffs as prevailing parties on their civil rights claims be vacated. The Court will first address defendants' argument that the Court lacks jurisdiction to hear the motions on mootness grounds. Next

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[6] The decision of this Court awarding plaintiffs attorneys fees for prosecuting the motion for contempt and as prevailing parties on their civil rights claim is reported at 737 F.Supp. 1350 (S.D.N.Y.1990).

the Court will discuss the reinstatement of noncompensatory sanctions against defendants and finally, will turn to the award of attorneys' fees.

I. Mootness

Before reaching the merits of plaintiffs' motions, the Court will briefly address defendants' argument that this Court lacks jurisdiction to entertain the motions because the case has been rendered moot. Defendants contend that there is no longer a live controversy in this case due to the lack of violations of the Permanent Injunction over the past seven years and the enactment of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994) ("FACE"). On those same grounds, defendants cross-move for vacatur of the Permanent Injunction.

Had this case indeed become moot, defendants would be entitled to dismissal as a matter of right. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (citation omitted). Defendants argue that

> [w]hen a defendant has voluntarily ceased activity sought to be enjoined, the action becomes moot when two conditions are met: 1) where "it can be said with assurance that 'there is no reasonable expectation' that the alleged violation will recur," and 2) where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

Defs.' Mem. in Opp. at 23 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (citations omitted)). As noted by the Supreme Court, "[i]n seeking to have a case dismissed as moot,

however, the defendant's burden 'is a heavy one.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306 (1987) (quoting *W.T. Grant Co.*, 345 U.S. at 633, 73 S.Ct. at 897). Under *Gwaltney*, a "defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" 484 U.S. at 66, 108 S.Ct. at 386 (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968)).

The Court does not believe defendants have met their burden, and fails to see how it can be said with any assurance that there is no reasonable expectation that the violations here will recur. This is especially true since defendants have never agreed to abide by the Permanent Injunction. Defendants argue that the seven years that have passed without their violating the injunction provide that expectation. Further, they contend that for the case to withstand a mootness challenge, plaintiffs must come forward with evidence showing that defendants intend further rescues. *Gwaltney*, however, makes clear that the burden of showing mootness rests squarely on defendants' shoulders. Defendants are always "free to return to [their] old ways." *W.T. Grant Co.*, 345 U.S. at 632, 73 S.Ct. at 897. Indeed, plaintiffs assert that, in the event defendants file a motion to dismiss, they stand ready to "show that reproductive health clinics in New York City continue to experience frequent demonstration activity, including harassment of clinic staff and physical obstruction of patients' access to reproductive health services." Pls.' Reply Mem. at 22, n. 15. Thus, it has not been made "absolutely clear" that violations are unlikely to recur.

Nor is the Court persuaded that the enactment of FACE renders this case moot, or militates that the Permanent Injunction be dissolved. The statute itself states that it shall not be construed "to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section." 18 U.S.C. § 248(d) (3). Therefore, it is not inconsistent with the Act for the Permanent Injunction herein to provide victims of abortion clinic blockades with additional or alternative remedies. As an alternative remedy, FACE cannot constitute an interim event that completely and irrevocably eradicates the effects of defendants' violations.

Neither the passage of time without violation, nor the enactment of FACE renders the Permanent Injunction moot, divesting this Court of jurisdiction. Thus, the Court will proceed to consider the merits of plaintiffs' motions.

II. The Motion for Reinstatement of Noncompensatory Sanctions

That defendants and non-party respondents violated the series of injunctive orders entered in this case has not been disputed.[7] Rather, the issue on remand is the nature of the remedy awarded in this case; particularly, whether the sanctions imposed for indirect contempts of the Permanent Injunction and the injunctive orders that preceded it are criminal in nature, requiring constitutional criminal procedural protections.

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[7] "No facts were disputed by any of defendants, nor by respondents B.O.R.N., Lee, Foreman, McMonagle, White, La Penna and Talluto." 732 F.Supp. at 396. Only respondents Adelle Nathanson and Robert Pearson disputed having knowledge of the Court's orders and blocking access to the clinics. After an evidentiary hearing, the Court found by clear and convincing evidence that they had knowingly violated the order and adjudged them in civil contempt. *Id.*

While compensatory fines paid to the aggrieved party have traditionally been viewed as remedial sanctions for civil contempt, noncompensatory fines paid into the court are generally seen as punitive sanctions to vindicate the authority of the court, requiring the constitutional protections attendant to criminal process. *Hicks v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429-30, 99 L.Ed.2d 721 (1988). A noncompensatory sanction imposed to coerce compliance with a court order, however, may be considered civil if the contemnor is given an opportunity to purge himself of the contempt. *United States v. United Mine Workers of America*, 330 U.S. 258, 305, 67 S.Ct. 677, 702, 91 L.Ed. 884 (1947). Civil contempt sanctions "are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *International Union, Mine Workers of America v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994).

Since the fines imposed pursuant to this Court's 1990 Order adjudging defendants and non-party respondents in contempt were non-compensatory, the Second Circuit has remanded the case for a determination as to whether they comport with the Supreme Court's 1994 ruling in *Bagwell*. In that case, the Supreme Court imposed "procedural burdens on courts' ability to sanction widespread, indirect contempts of complex injunctions through noncompensatory fines." *Id.* at 838, 114 S.Ct. at 2563.

Bagwell involved a labor dispute during which striking members of the United Mine Workers violated an injunction prohibiting them from "obstructing ingress and egress to company facilities, throwing objects at and physically threatening company employees, placing tire-damaging 'jackrocks' on roads used by company vehicles,

and picketing with more than a specified number of people at designated sites." *Id.* at 823, 114 S.Ct. at 2555. After contempt hearings, the Circuit Court of Virginia, Russell County, fined the Union $642,000 for its disobedience. The court also set out a schedule of fines for future contempts, including "$100,000 for any future violent breach of the injunction and $20,000 for any future nonviolent infraction." *Id.* The court noted that its purpose was to "impos[e] prospective civil fines[,] the payment of which would only be required if it were shown the defendants disobeyed the Court's orders." *Id.* The defendants proceeded to violate the injunction 400 times. In accordance with the schedule it had laid out, the court levied a total of $64,000,000 in fines against the Union. Of that amount, $12,000,000 was to be paid to the victim companies and the remaining $52,000,000 was to be paid to the Commonwealth of Virginia and to two counties where most of the illegal activity took place. *Id.* at 825, 114 S.Ct. at 2556.

Ultimately, the underlying labor dispute was settled, and the parties moved to vacate the outstanding contempt fines. The court granted the motion as to the $12,000,000 in fines payable to the companies, but refused to vacate the $52,000,000 in fines payable to Virginia, reasoning that they were civil, coercive and payable to the public. *Id.* On appeal, the Union argued that the fines were criminal in nature and could not properly be imposed absent a criminal trial. The Supreme Court of Virginia disagreed, holding that:

> [w]hen a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control of his destiny. The same is true with respect to the court's orders in the

> present case. A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate.

Bagwell v. International Union, United Mine Workers of America, 244 Va. 463, 477, 423 S.E.2d 349 (1992).

The Supreme Court of the United States reversed, holding that in cases involving the levy of "contempt fines for widespread, ongoing, out-of-court violations of a complex injunction ... disinterested fact finding and even -- handed adjudication were essential, and petitioners were entitled to a criminal jury trial." 512 U.S. at 838, 114 S.Ct. at 2562. The Court "decline[d] to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law." *Id.* The Court noted, however, that

> [a] contempt fine ... is considered civil and remedial if it either "coerce [s] the defendant into compliance with the court's order, [or] ... compensate [s] the complainant for losses sustained." Where a fine is not compensatory, *it is civil only if the contemnor is afforded an opportunity to purge*. Thus, a "flat, unconditional fine" totalling even as little as $50 announced after a finding of contempt is criminal *if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance*.

Id. at 829, 114 S.Ct. at 2558 (quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701-02, 91 L.Ed. 884 (1947) and *Penfield Co. v. S.E.C.*,

330 U.S. 585, 588, 67 S.Ct. 918, 920, 91 L.Ed. 1117 (1947), respectively) (emphasis added). The above language clearly allows non-compensatory sanctions to be deemed civil where contemnors are given a subsequent opportunity to purge.

As noted by the Court in *Bagwell*, *United States v. United Mine Workers of America*, 330 U.S. 258, 305, 67 S.Ct. 677, 702, 91 L.Ed. 884 (1947) is the Court's "sole prior decision squarely addressing the judicial power to impose coercive civil contempt fines." *Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2558. In *United Mine Workers*, an earlier labor case also having the United Mine Workers as defendant, the Union and its president were held in criminal and civil contempt for violating a temporary restraining order forbidding them from terminating the Krug-Lewis Agreement, a labor contract entered into between the Union and the Government.[8] In spite of the order, the defendants circulated to union members a notice terminating the agreement, resulting in a nation-wide strike that threatened to cripple the national economy. *United Mine Workers*, 330 U.S. at 303, 67 S.Ct. at 701. The district court imposed criminal fines of $10,000 against John L. Lewis, the president of the Union, and $3,500,000 against the Union. *Id.* at 302, 67 S.Ct. at 700-01.

On appeal, the Supreme Court noted that where the purpose of a civil sanction is to make the defendant comply with the injunction, a court must

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[8] At the time, the Government was in possession of and operating a major portion of the country's bituminous coal mines pursuant to Executive Order 9728, 11 F.R. 5593. President Truman had authorized government seizure of some of the mining facilities when the production of bituminous coal had been interrupted by labor strife, disrupting the economic transition from war to peace.

> consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired .... [As] a corollary of the above principles ... a court ... must ... consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

330 U.S. at 304, 67 S.Ct. at 701. The Court upheld a fine of $10,000 against Lewis but held that the $3,500,000 fine levied against the Union as punishment for its criminal contempt was excessive. Applying the principles laid out above, the Court reasoned that a criminal, unconditional fine of $700,000 against the Union was warranted. The Court held that "in order to coerce the defendant union into a future compliance with the court's order, it would have been effective to make the other $2,800,000 of the fine conditional on the defendant's failure to purge itself within a reasonable time." *Id.* at 305, 67 S.Ct. at 702. Since the fine was conditional, and thus avoidable, there was no need to calibrate it to the Union's financial resources. In the Court's mandate, the Union was given five days to show that it had fully complied with the temporary restraining order. *Id.* To comply, the Union had to withdraw the notice terminating the labor agreement and notify its members of such withdrawal in substantially the same manner in which the notice of termination had been communicated. *Id.* Additionally, the Union had to instruct its members that the labor agreement was in full force and effect. *Id.* Summarized by Justice Blackmun in *Bagwell*, *United Mine Workers* stands for the proposition that "fixed fines also may be considered purgable and civil when imposed and

suspended pending future compliance." *Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2558.

This Court recognizes that, like in *Bagwell*, the non-compensatory fines herein sanctioned widespread, indirect contempts of a complex injunction. However, even *Bagwell* acknowledges that a subsequent opportunity to purge gives the contemnor the proverbial key to his cell, making the contempt civil and the sanction one that may be imposed absent criminal procedural protections.

As recently as last year, a panel of the Second Circuit noted that "[u]nder Bagwell, a noncompensatory fine is civil, and thus may ordinarily be imposed in the absence of a criminal trial '... if the contemnor is afforded an opportunity to purge.'" *People v. Operation Rescue National*, 80 F.3d 64, 68 n. 7 (2d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 85, 136 L.Ed.2d 42 (1996) (quoting *Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2558 (citation omitted)). In that case, which also involved an injunction restricting demonstrations in front of abortion clinics, because the respondent did not challenge his fine on appeal, the Second Circuit did not reach the issue of whether the Court's judgment "provided [respondent] with the sort of 'opportunity to purge' that *Bagwell* requires." *Id.*

Also last year, the District Court for the District of Columbia was presented with similar issues. In *N.O.W. v. Operation Rescue*, 37 F.3d 646 (D.C. Cir.1994), which also involved contempts of an injunction prohibiting the blockading of abortion clinics, the D.C. Circuit vacated the District Court's levy of noncompensatory fines, remanding the case to the District Court

> to make an express determination as to the existence, nature, and extent of any such

> compensable damages, and to tailor compensatory civil fines accordingly .... Any fines for out-of-court violations of this complex injunction not expressly determined to be compensatory *or otherwise falling into a category appropriate for treatment as a civil contempt under Bagwell*, however, must be regarded as criminal, entitling the alleged contemnors to criminal procedural protections.

37 F.3d at 661 (emphasis added). The D.C.Circuit also recognized that under *Bagwell*, some categories of non-compensatory contempt sanctions, *i.e.* where the contemnors were given a subsequent opportunity to purge, could be considered civil. Like the Permanent Injunction here, the order in *Operation Rescue* established a schedule of escalating, prospective fines for violations. *Id.* at 650. On remand, the District Court for the District of Columbia readily conceded that the noncompensatory fines imposed for civil contempts were criminal in nature. *N.O.W. v. Operation Rescue*, 929 F.Supp. 461, 463-64 (D.D.C.1996). The issue became whether prosecutions for criminal contempt could be initiated more than one year after the contumacious activity had occurred. *Id.* at 464-65. The court concluded that the contempts, which also constituted the local offense of "incommoding," were governed by 18 U.S.C. § 402, which provides that:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the

> act or thing so done be of such character as to constitute a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

Section 402 has a one-year statute of limitations. Thus, the court ruled that the prosecutions for the contempts, none of which had occurred within the previous year, were time-barred. *N.O.W. v. Operation Rescue*, 929 F.Supp. at 465. The court declined to address a motion for inclusion of a purge provision in the injunction, deciding instead to terminate the permanent injunction in view of "[t]he passage of time, without further violation, and Congress' creation of a federal criminal sanction." *Id.* at 466.[9]

Operation Rescue is virtually indistinguishable from the case at bar. A factual resemblance between the cases, however, does not require that this Court follow the result reached by the District Court for the District of Columbia. Like the injunction in *Operation Rescue*, the Permanent Injunction here was crafted, and the contempt sanctions imposed, without the benefit of the Supreme Court's analysis in *Bagwell*. Under the Supreme Court's teachings in *United Mine Workers* and *Bagwell*, the scale of escalating fines set out in the Permanent Injunction could have been properly imposed as civil had contemnors been afforded a subsequent opportunity to purge.

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[9] For the reasons set forth in section I, *supra*, this Court declines to terminate the Permanent Injunction herein.

Moreover, the Court finds that under the circumstances of this case, the amount of the fines imposed, ranging from $25,000-$100,000, was appropriate. Under *United Mine Workers*, unconditional, prospective fines intended to coerce compliance must be set in accordance with the defendants' financial resources. Where the fine is conditional, however, there is no need to adjust it to contemnor's financial resources. Thus, in *United Mine Workers*, a fine of $2,800,000, not discernibly calibrated to the Union's finances, was upheld where defendants were given an opportunity to purge. Even if the Court is required to consider defendants' resources in imposing a non-compensatory contempt sanction, the defendants and non-party respondents in this case failed to provide the Court with financial information that may have warranted a reduction in the amounts of the sanctions.[10] As is painstakingly documented in this Court's prior opinions, defendants organized and coordinated several blockades of abortion clinics in flagrant violation of the Permanent Injunction and in an effort to "face down" this Court, 732 F.Supp. at 395, encouraging demonstrators "to engage in 'total, complete non-cooperation' with the police." *Id.* (citation omitted). Clearly, meaningful sanctions were required to coerce compliance with the Court's orders.

The Court is not inclined to stay collection of the fines levied against defendants without a promise that, in the future, they will adhere to the orders entered in this case. Modifying the Permanent Injunction to include a purge provision would bring it into compliance with *Bagwell*.

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[10] In its February, 1990 Opinion, the Court noted that, "[n]either defendants nor respondents provided the Court with any financial information upon which the burden of imposing the sanction on them might be evaluated, and this failure may not be charged against plaintiffs in determining the reasonableness of the fine." 732 F.Supp. at 405, n. 13.

Defendants' argument that this Court is without authority to modify the injunction is meritless, since "[t]he power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir.), *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 257 (1983).[11] Defendants can avoid payment of the fines by agreeing to obey the Permanent Injunction in the future. Accordingly, the parties are directed to settle on notice a Modified Permanent Injunction affording contemnors the "subsequent opportunity to purge" contemplated by *United Mine Workers* and *Bagwell*.

III. The Award of Attorneys' Fees for Prosecuting the Motion for Contempt

It is well settled in this Circuit that costs, including reasonable attorneys' fees, may be awarded to the party who prosecutes a contempt motion as an appropriate compensatory sanction for contumacious behavior. *Hutto v. Finney*, 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522 (1978); *Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir.1996); *Manhattan Indus., Inc. v. Sweater Bee By Banff, Ltd.*, 885 F.2d 1, 8 (2d Cir.1989), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1477, 108 L.Ed.2d 614 (1990); *N.A. Sales Co., Inc. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir.1984); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979); *Backo v. Local 281, United Brotherhood of Carpenters and Joiners of America*, 438 F.2d 176, 182 (2d Cir.1970), *cert. denied*, 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971); *W.E. Bassett Co. v. Revlon*, Inc.,

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[11] In *Operation Rescue*, the D.C. Circuit noted that "it [was] not too late to correct course; but the precise correction required in this case is a matter appropriately left to the district court in the first instance." 37 F.3d at 662.

435 F.2d 656, 665 n. 5 (2d Cir.1970); Rule 43(a), Civil Rules of the United States Courts for the Southern and Eastern Districts of New York ("A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage.")

For the victim of a contempt to be awarded attorneys' fees for prosecuting the contempt, contemnor's conduct must have been willful. *Weitzman*, 98 F.3d at 719; *Vuitton*, 592 F.2d at 130. A willful contempt is one where "contemnor had actual notice of the court's order, was able to comply with it, did not seek to have it modified, and did not make a good faith effort to comply." *E.E.O.C. v. Local 638, Sheet Metal Workers' Int'l Ass'n*, 889 F.Supp. 642, 670-71 (S.D.N.Y.1995) (citation omitted). As is detailed in this Court's February 1990 Opinion, the contempts at issue here were clearly willful. All of the defendants and non-party

respondents held in contempt had notice of the orders.[12] Contemnors easily could have complied with the orders by abandoning their efforts to obstruct access to the clinics. Thus, their continued blockading of clinics even after receiving notice of the Orders entered in this case demonstrates that the several defendants and non-party respondent contemnors did not make a good faith effort to comply with the orders. As previously noted by this Court, "[t]he evidence more than adequately demonstrates the intentional violation of the three orders of this Court by the various defendant and respondent contemnors." 732 F.Supp. at 409.

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[12] All of the demonstrations were organized and coordinated by Operation Rescue and its leader, Terry. Herlihy was personally served with a copy of the May 4, 1988 Order during the May 6, 1988 demonstration. 732 F.Supp. at 399. Lee discussed the Preliminary Injunction at a B.O.R.N. rally held on October 27, 1988. Thus, both Lee and B.O.R.N. had knowledge of the October 27, 1988 Order. *Id.* at 405. Additionally, Lee was personally served with a copy of the Permanent Injunction on January 12, 1989, before he participated in the January 13, 1989 demonstration at the Margaret Sanger Clinic. *Id.* Foreman and McMonagle were each personally served with a copy of the Permanent Injunction on January 12, 1989. *Id.* at 406. White was present when the Permanent Injunction was read aloud by police during the January 13, 1989 demonstration at the Margaret Sanger Clinic. *Id.* Talluto and La Penna were both present when the October 27, 1988 Order was read aloud during the October 29, 1988 demonstration at the Women's Pavilion Clinic in Deer Park. *Id.* They were both subsequently arrested. *Id.* Talluto was present during the January 14, 1989 demonstration before the V.I.P. clinic when the Permanent Injunction was read aloud before the police began making arrests. *Id.* Adelle Nathanson was present at the demonstration at the Women's Pavilion Clinic in Dobbs Ferry where the October 27, 1988 Order was read aloud on two occasions. A videotape shows Pearson standing a few feet from a police officer who read the contents of the Permanent Injunction during the January 14, 1989 demonstration at the V.I.P. Clinic in Manhattan.

Recently, the Second Circuit noted that "a district court, having found willful contempt, would need to articulate persuasive grounds for any denial of compensation for the reasonable legal costs of the victim of contempt." *Weitzman*, 98 F.3d at 719. Therefore, this Court will reinstate the award of attorney's fees here, where the underlying contempts were indeed willful.

The Court sees no reason to revisit the amount of attorneys' fees and costs awarded. The Second Circuit has repeatedly held that "trial courts enjoy considerable discretion in determining the appropriate amount of attorney fees." *Weitzman*, 98 F.3d at 720 (citing *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1063 (2d Cir.1995); *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir.1993)). The Court divided the prosecution of the contempt motion into two phases. The first phase -- the costs of which were assessed against all contemnors -- involved the collection of evidence of violations of this Court's orders and the drafting of the Order to Show Cause for Civil Contempt by plaintiffs' counsel. 737 F.Supp. at 1363. The second phase consisted of the time spent by plaintiffs preparing for and conducting the August 1989 evidentiary hearing on the contempt motion against A. Nathanson, B. Nathanson, and Pearson. *Id.* Accordingly, the costs for the second phase were assessed only against A. Nathanson and Pearson.[13] For both phases, the Court carefully calculated each contemnor's *pro rata* share of costs based on documentation provided to the Court

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[13] B. Nathanson was not adjudged in contempt since the Court found no clear and convincing evidence that he had violated the Permanent Injunction by blocking access to the Margaret Sanger Clinic in Manhattan on January 14, 1989. B. Nathanson appeared to heed the reading of the Permanent Injunction, denied that he had been in the area, and had not been arrested like hundreds of other demonstrators. 732 F.Supp. at 407.

by plaintiffs. *Id.* at 1363-66. Indeed, the contemnors did "not challenge[ ] the reasonableness of the time spent by plaintiffs' counsel, the rates sought, or the amount of costs incurred in either phase." *Id.* at 1364. However, since the judgments of contempt entered against non-party respondents Talluto and La Penna were reversed by the Second Circuit on the ground that this Court lacked jurisdiction over them,[14] this Court's order that they pay a pro rata share of plaintiffs' attorneys' fees is vacated. Accordingly, the costs of prosecuting the motions for contempt against Talluto and La Penna will be borne by plaintiffs.

IV. The Award of Attorneys' Fees Under 42 U.S.C. § 1988

Under the Second Circuit's mandate, this Court must reconsider its award of attorneys' fees to plaintiffs as prevailing parties on their civil rights claim in light of the Supreme Court's ruling in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). In *Bray*, the Supreme Court held that for § 1985(3) purposes, women seeking abortions did not constitute a qualifying class and that the goal of preventing abortions did not constitute "invidiously discriminatory animus" toward women. 506 U.S. at 269, 274, 113 S.Ct. at 759, 761. The Court ruled that since plaintiffs "were not entitled to relief under § 1985(3), they were also not entitled to attorney's fees and costs under 42 U.S.C. § 1988." *Id.* at 285, 113 S.Ct. at 768. Accordingly, the Supreme Court vacated the award of fees. *Id.* In *Operation Rescue*, the D.C.Circuit reached the same result. 37 F.3d at 653-54.

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[14] 961 F.2d 390, 393 (2d Cir.1992).

Both of those cases, however, differ from the instant action in one important respect. In *Bray* and *Operation Rescue*, the Supreme Court and the D.C. Circuit, respectively, reversed the district courts' findings that plaintiffs had prevailed on their civil rights claims. That is not the case here, where this Court's grant of summary judgment,[15] holding that plaintiffs prevailed on their § 1985(3) claim, stands. The Court of Appeals affirmed that Order,[16] and defendants' petition for a writ of certiorari was denied. As noted by Justice Jackson in *Brown v. Allen*,

> for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata* ... A civil or criminal judgment usually becomes *res judicata* in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up.

344 U.S. 443, 543, 73 S.Ct. 397, 428, 97 L.Ed. 469 (1953) (Jackson, J., concurring). This Court's holding that plaintiffs are prevailing parties on their civil rights claim is therefore *res judicata*.

The question remains, however, whether *Bray*, applied retroactively, mandates vacatur of the award of

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[15] This Court's Opinion granting plaintiffs summary judgment on their civil rights claim is reported at 704 F.Supp. 1247 (S.D.N.Y.1989).

[16] *N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990).

attorneys' fees.[17] Under 42 U.S.C. § 1988, "the court in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." Although the statute makes the award of fees discretionary, there is generally "a presumption that successful civil rights litigants should recover reasonable attorney's fees unless special circumstances render such an award unjust." *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir.1985) (citing S.Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.Code Cong. & Ad.News 5908, 5912); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983); *Newman v. Piggie Park Enterprises*, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966-67, 19 L.Ed.2d 1263 (1968) (*per curiam*).

To overcome this presumption, defendants must show special circumstances that would render the award of attorneys' fees unjust. *Hensley*, 461 U.S. at 429, 103 S.Ct. at 1937 (citation omitted). Such circumstances do not exist, however, where the action before the Court "involve[s] 'serious threats to constitutional rights, or effectuating congressional policies of high priority.'" *Rivera v. LaPorte*, No. 82 Civ. 0291, 1990 WL 186842 at *1 1990 U.S.Dist. LEXIS 15736 at *3 (S.D.N.Y. Nov. 13, 1990) (quoting *Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1371 (N.D.N.Y.1977)). The instant action involves interference with the constitutional right to choose an abortion. *Planned*

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[17] The award of § 1988 attorneys' fees, *N.O.W. v. Terry*, 737 F.Supp. 1350 (S.D.N.Y.1990), was on direct review when the Supreme Court decided *Bray*, and thus was subject to the retroactive application of any new principles of federal law announced in *Bray*. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) (holding that when the Supreme Court "applies a [new] rule of federal law ... that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review").

Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992). Congress' enactment of the Federal Access to Clinic Entrances Act of 1994, in response to the Supreme Court's decision in *Bray*, further demonstrates that preventing the exact conduct at issue in this case is a "congressional policy of high priority." Given these circumstances, defendants have failed to overcome the presumption in favor of awarding attorneys' fees to plaintiffs.[18]

Since *Bray* does not affect this Court's final decision that plaintiffs prevailed on their civil rights claims, plaintiffs should receive all of the attendant benefits, including fees. Nothing in the Second Circuit's mandate precludes this result, since that mandate requires this Court only to *reconsider* the award of attorneys' fees. Accordingly, the Court's July 9, 1990 Order awarding plaintiffs attorneys' fees as prevailing parties on their civil rights claim is hereby reinstated.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reinstatement of the May 10, 1990 Order and the July 9, 1990 Order is granted. The Court's Order of May 10, 1990

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[18] Since defendants' only argument against reinstatement of § 1988 attorneys' fees was a collateral attack on this Court's final order granting plaintiffs summary judgment on their civil rights claim, the Court need not revisit its methodology in calculating the award of § 1988 attorneys' fees.

adjudging defendants in contempt and imposing noncompensatory sanctions on defendants is reinstated on condition that defendants and non-party respondents are given an opportunity to purge themselves of the contempts and avoid the noncompensatory fines. Finally, the Court's Order of July 9, 1990 awarding plaintiffs attorneys' fees incurred in bringing a motion for contempt and as prevailing parties on their civil rights claim is reinstated.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

And

UNITED STATES OF AMERICA,

Judgment Creditor,

Against

RANDALL TERRY, et al.,

Defendants.

ORDER AMENDING AND REINSTATING JUDGMENTS

88 Civ. 3071 (RJW)

Plaintiffs' motion dated April 2, 1996 to reinstate the Orders of the Court dated May 8, 1990, and July 9, 1990, adjudging defendants Randall Terry, Operation Rescue, and Thomas Herlihy, and respondents Bistate Operation Rescue Network ("B.O.R.N.") Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, and Robert Pearson in civil contempt, and awarding attorney's fees against said defendants and respondents, having been granted in an Opinion dated January 17, 1997, it is hereby

ORDERED AND ADJUDGED that the May 8, 1990 Order of the Court adjudging said defendants and respondents in contempt and imposing upon them coercive and civil sanctions is amended and reinstated and that the United States of America, as Judgment Creditor, shall re cover of defendants and respondents as follows:

Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of the Court's October 27, 1988 Order (the "October 27 Order") and permanent injunction entered on January 10, 1989 ("the Permanent Injunction") and are assessed coercive civil penalties in the amount of $100,000. Defendant Thomas Herlihy is adjudged in civil contempt of the Court's May 4, 1988 Order (the "May 4 Order") and is assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. is adjudged in civil contempt of the court's October 27 Order and is assessed coercive civil penalties in the amount of $25,000. Respondent Jesse Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and is assessed coercive civil penalties in the amount of $100,000. Respondent Joseph Foreman is adjudged in civil contempt of the Court's Permanent Injunction and is assessed coercive civil penalties in the amount of $25,000. Respondents Michael McMonagle and

Jeff White are adjudged in civil contempt of the Court's Permanent Injunction and are assessed coercive civil penalties in the amount of $25,000. Respondent Robert Pearson is adjudged in civil contempt of the Court's Permanent Injunction and is assessed coercive civil penalties in the amount of $25,000.

IT IS FURTHER ORDERED that the foregoing defendants and respondents ("the contemnors"), individually or collectively, shall have the opportunity to purge themselves of contempt and be excused from paying the aforesaid noncompensatory coercive civil penalties through full compliance with the following:

Affirmation

(1) A contemnor seeking to purge attempt shall file with the Court an Affirmation (the "Affirmation") stating that the contemnor shall abide by the terms of the Permanent Injunction and shall not directly or indirectly violate any terms of the Permanent Injunction.

Publication

(2) A contemnor seeking to purge a contempt shall take reasonable steps to publish (in the manner described below) a copy of the Affirmation, together with a letter (the "Explanatory Letter") explaining that the contemnor has been held in contempt for violating an Order or Orders of this Court and/or the Permanent Injunction (as the case may be), and that, in order to purge the contempt, the contemnor has agreed to comply with the Permanent Injunction in the future. Publication shall be made in a manner reasonably calculated to reach all persons with whom said contemnor communicated at any time during the course of this action

for the purpose of informing said persons of demonstrations, protests or blockades at abortion facilities within the geographical scope of the Permanent Injunction, or of soliciting participation, financial support, or any other assistance for such demonstration, protests or blockades. Publication may include such means of communication as advertisements in newspapers of general circulation, press releases, media broadcasts, and/or mailings to mailing lists and /or newsletters used by or on behalf of such contemnor(s).

Certification of Publication

(3) Upon publishing the Affirmation to the persons specified above, the contemnor shall file with the Court a certification (the "certification') of the manner of publication, including samples of each method of publication used.

Procedure

(4) A contemnor seeking to purge a contempt shall, within fifteen (15) days of the date of this Order, furnish the Court and counsel for plaintiffs with written notice of such intent. The parties shall then confer in a good faith effort to agree on the proposed manner and content of publication. If the parties reach agreement, the contemnor shall, within thirty (30) days of the date of this Order, file with the Court (a) the Affirmation, duly executed; (b) the Explanatory Letter; and (c) a description of the proposed manner of publication, and shall, within sixty (60) days of the date of t his Order, carry out such publication and file the Certification with the Court. In the event the parties cannot agree on the manner and content of publication, they shall, within thirty (30) days of the date of this Order, file letters

(not exceeding three pages) with the Court stating the substance of the disagreement and requesting a conference forthwith.

(5) The provisions of this Order authorizing the United States of America, as Judgment Creditor, to recover coercive civil sanctions from the aforesaid contemnors are hereby stayed in order to give said contemnors an opportunity to purge their contempt in the manner provided above. Absent further order of the Court, said stay shall automatically be lifted sixty (60) days after the date of this Order as to any contemnor who fails to comply with the provisions of Paragraph (4) of this Order.

(6) Upon filing the Certification demonstrating compliance with this Order, the contemnor may, upon notice, move to vacate all noncompensatory coercive civil sanctions awarded against said contemnor not previously paid. Opposition to such a motion shall be served and filed within thirty (30) days of service thereof and any reply shall be served and filed within ten (10) days thereafter.

(7) Nothing in this Order shall affect plaintiffs' right to enforce any order adjudging defendants and respondents liable to plaintiffs for payment of attorney's fees, and plaintiffs may enforce said orders and judgments forthwith.

IT IS FURTHER ORDERED AND ADJUDGED that the July 9, 1990 Order of the Court awarding plaintiffs attorney's fees is amended and reinstated, and that plaintiffs, as Judgment Creditors, shall recover of defendants and respondents as follows:

(1) Plaintiffs shall recover of the Defendants Randall Terry [last known address: 10 Academy St., Windsor, New York], Operation Rescue [last known address: 230 Chenango

St., Binghamton, New York] and Thomas Herlihy [last known address: Casales Place 100-17, Bronx, New York] the sum of $157,505.81. Defendants Terry, Operation Rescue and Thomas Herlihy are jointly and severally liable for this sum;

(2) Plaintiffs shall recover of Defendants Randall Terry [last known address: 10 Academy St., Windsor, New York] and Operation Rescue [last known address: 230 Chenango St., Binghamton, New York] the additional sum of $12,901.86. Defendants Terry and Operation Rescue are jointly and severally liable for this sum;

Plaintiffs shall recover of the Defendant Thomas Herlihy [last known address: Casales Place 100-17, Bronx, New York] the additional sum of $3,190.02;

(3) Plaintiffs shall recover of respondent B.O.R.N. [last known address: 496A Hudson St., Ste. K. 122, New York, New York] the sum of $3,190.02;

(4) Plaintiffs shall recover of respondent Jesse Lee [last known address: 72-74 Bedford St., #1A, New York, New York] the sum of $12,901.86;

(5) Plaintiffs shall recover of responden5t Joseph Foreman [last known address: 290 Robin Ln., Marietta, Georgia] the sum of $6,450.93;

(6) Plaintiffs shall recover of respondent Michael McMonagle [last known address: 4329 Freeland Ave., Philadelphia, Pennsylvania 19128] the sum of $3,190.02;

(7) Plaintiffs shall recover of respondent Jeff White [last known address: 2909 Kristi Court, Santa Cruz, California 95065] the sum of $3,190.02;

(8) Plaintiffs shall recover of respondent Robert Pearson [last known address: 16 Chestnut Pl., W. Long Branch, New Jersey] the sum of $12,542.05; and

IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this action for purposes of enforcement of the terms of this Order and of the Judgments provided for herein.

Dated: New York, New York
March 21, 1997

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U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights -- New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro-Choice Coalition,
Plaintiffs-Appellees,
and
The City of New York, Intervenor-Appellee,
and
United States of America, Creditor-Appellee,
v.
Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,
Randall A. Terry; Operation Rescue; and Thomas Herlihy,

Defendants-Appellants,
Bernard Nathanson, Respondent,
Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; Bistate Operation Rescue Network; and Christopher Slattery,
Respondents-Appellants,
A. Lawrence Washburn, Jr., Counsel-Appellant.

Nos. 1427, 1552, 1553,
Dockets 90-6187, 91-6011, 91-6029.

Argued May 20, 1991.

Decided April 13, 1992.
Vacated March 29, 1993.
Reinstated July 2, 1993.
Vacated Aug. 3, 1994.
Decided Dec. 2, 1994.

Before: KEARSE, MAHONEY, and SNEED*, Circuit Judges.

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* The Honorable Joseph T. Sneed, of the United States Circuit Court for the Ninth Circuit, sitting by designation.

PER CURIAM:

We initially decided this appeal in *New York State National Organization for Women v. Terry*, 961 F.2d 390 (2d Cir.1992) ("*NOW I*"), by affirming most of the judgments of civil contempt from which this appeal was initially taken. *See Id.* at 401. The Supreme Court granted certiorari, and vacated and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Pearson v. Planned Parenthood Margaret Sanger Clinic*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993). We then reinstated our initial judgment, directing the parties to address any applications for relief in light of *Bray* to the district court in the first instance. *New York State National Organization for Women v. Terry*, 996 F.2d 1351 (*per curiam*) (2d Cir.1993).

An appeal was again taken, and the Supreme Court again vacated our judgment and remanded, this time for reconsideration in light of *International Union, Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). *Pearson v. Planned Parenthood Margaret Sanger Clinic*, __ U.S. __, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994). We then requested, and have reviewed, letter briefs from the parties regarding this latest remand. We now vacate and remand those determinations of the district court that were affirmed in NOW I.

In *Bagwell*, the Court "address[ed] whether contempt fines levied against a union for violations of a labor injunction [were] coercive civil fines, or [were] criminal fines that constitutionally could be imposed only through a jury trial." 512 U.S. at __, 114 S.Ct. at 2555. The injunction was issued during a labor dispute. It prohibited the participating union and its members "from, among other things, obstructing ingress and egress to company facilities,

throwing objects at and physically threatening company employees, placing tire-damaging 'jackrocks' on roads used by company vehicles, and picketing with more than a specified number of people at designated sites." *Id.* The state court that issued the injunction subsequently announced that it would "fine the union $100,000 for any future violent breach of the injunction and $20,000 for any future nonviolent infraction." *Id.* Pursuant to this provision, and after holding seven subsequent contempt hearings without a jury for which the parties conducted discovery, at which they introduced evidence and called and cross-examined witnesses, and at which contumacious acts were required to be proved beyond a reasonable doubt, the state court found the union in contempt for more than 400 separate violations of the injunction and levied over $64,000,000 in fines against the union, of which $52,000,000 remained at issue before the Court. *Id.* at __, 114 S.Ct. at 2555-56.

The Court reversed, ruling that the union was entitled to a criminal jury trial before the fines could be imposed. *Id.* at __, 114 S.Ct. at 2563. In doing so, the Court stated:

> We ... decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.
>
> Other considerations convince us that the fines challenged here are criminal. The union's sanctionable conduct did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it. Nor did the union's contumacy involve simple, affirmative acts, such as the paradigmatic civil contempts examined in *Gompers* [*v.*

> *Bucks Stove and Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911)]. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totalling over $52,000,000. Under such circumstances, disinterested fact finding and even-handed adjudication were essential, and petitioners were entitled to a criminal jury trial.

Id. at __, 114 S.Ct. at 2562 (footnote omitted).

The *Bagwell* ruling has recently been applied in a case that is virtually indistinguishable from the litigation that is before this court. *In National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C.Cir.1994), an injunction barred abortion protesters from interfering with access to abortion clinics, and "established a schedule of escalating prospective fines for continued violations of the injunction, payable to the clinics." *Id.* at 649. The district court subsequently imposed noncompensatory fines of $145,000 upon various defendants for violating the injunction. The defendants appealed, and the District of Columbia Court of Appeals vacated the noncompensatory fines and remanded, *Id.* at 661, ruling that "the protections of criminal procedure are necessary under the principles enunciated in *Bagwell*, 512 U.S. at __, 114 S.Ct. at 2561." *Id.* 37 F.3d at 660. The court noted that the amount of the fines was considerably less in *Operation Rescue* than in *Bagwell*, *id.*, and that the

provisions of the *Bagwell* injunction were considerably more complex than those of the *Operation Rescue* decree, *id.* at 661, but concluded that the amount of the *Operation Rescue* fines and the mandated governance of out-of-court conduct nonetheless sufficed to require "the protection of criminal procedure" mandated by *Bagwell*. *Id.*

In light of *Bagwell* and *Operation Rescue*, we conclude that the noncompensatory fines imposed by the district court in this case, concededly without the benefit of a jury trial and related protections of criminal procedure, must be vacated. Opposing this result, plaintiffs-appellees contend that *Bagwell* involved a more complex injunctive "code of conduct," correspondingly more complicated factfinding, and considerably more onerous financial penalties than are presented in the instant case. It is nonetheless true that, as in *Bagwell*, the punished conduct did not occur in the court's presence and involved something akin to "an entire code of conduct that the court itself had imposed." *Bagwell*, 512 U.S. at __, 114 S.Ct. at 2562; *see also Operation Rescue*, 37 F.3d at 661 ("the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum"). Further, the noncompensatory fines totalling $500,000 in this case can hardly be considered *de minimis*, even if not in the *Bagwell* league. The fines imposed here are roughly three times the noncompensatory fines for which *Operation Rescue* required *Bagwell* procedures. The fact that *Operation Rescue* and its adherents had notice of the injunctions in this case, and would not have been subjected to contempt penalties if they had obeyed them, does not seem germane to the question what procedures are required, in light of *Bagwell*, to impose such penalties.

The legal fees related to the vacated contempt sanctions are correspondingly vacated. The district court must also reconsider the legal fees awarded pursuant to 42 U.S.C. § 1988. *See Bray*, 506 U.S. at __, 113 S.Ct. at 767-68 (because respondents were not entitled to relief under 42 U.S.C. § 1985(3), also not entitled to attorney fees and costs under 42 U.S.C. § 1988); *Operation Rescue*, 37 F.3d at 653 (same).

In accordance with the foregoing, those determinations of the district court that were affirmed in *NOW I* are vacated, and the case is remanded for further proceedings consistent with *Bray* and *Bagwell*. The parties shall bear their own costs.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

Robert PEARSON, et al., petitioners,
v.
PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), et al.

No. 93-828.

June 30, 1994.

Former decision, 507 U.S. 901, 113 S.Ct. 1233.

Case below, *N.Y. State Nat. Organization for Women v. Terry*, 732 F.Supp. 388; 961 F.2d 390; 996 F.2d 1351.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994).

APPENDIX G

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights -- New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro-Choice Coalition,

Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America, Creditor-Appellee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to

plaintiffs, said
fictitious names being intended to designate organizations or persons
who are members of defendant organizations, and others acting in concert with
any of the defendants who are engaging in, or intend to engage in, the conduct
complained of herein, Defendants,
Randall A. Terry; Operation Rescue; and Thomas Herlihy, Defendants-Appellants,
Bernard Nathanson, Respondent,
Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence
Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson;
BiState Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,
A. Lawrence Washburn, Jr., Counsel-Appellant.

Nos. 1427, 1552 and 1553, Dockets 90-6187, 91-6011 and 91-6029.

Argued May 20, 1991.

Decided April 13, 1992.
Vacated March 29, 1993.
Reinstated July 2, 1993.

The judgment entered pursuant to our initial opinion on this appeal, *see* 961 F.2d 390 (2d Cir.1992), was vacated by the Supreme Court and remanded for reconsideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). We reinstate the judgment.

Before: KEARSE, MAHONEY, and SNEED*, Circuit Judges.

PER CURIAM:

We initially decided this appeal in *New York State National Organization for Women v. Terry*, 961 F.2d 390 (2d Cir.1992). The Supreme Court granted certiorari *sub. nom Pearson v. Planned Parenthood Margaret Sanger Clinic*, and vacated and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Pearson*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993). We then directed the submission of letter briefs by the parties regarding the proper disposition upon remand.

We now reinstate the initial judgment in this appeal entered pursuant to our prior opinion. Applications for such relief in light of *Bray* as dismissal of the federal claims, a remand of the action to state court, or reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court.

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* The Honorable Joseph T. Sneed, Judge of the United States Circuit Court for the Ninth Circuit, sitting by designation.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

Robert PEARSON, et al., petitioners,
v.
PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN,) et al.

No. 92-282.

February 22, 1993

Case below, *N.Y. State Nat. Org. for Women v. Terry*, 732 F.Supp. 388; 737 F.Supp. 1350; 961 F.2d 390.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).

APPENDIX I

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights -- New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro-Choice Coalition,

Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America, Creditor-Appellee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the

real names of said defendants being presently unknown to plaintiffs, said
fictitious names being intended to designate organizations or persons
who are members of defendant organizations, and others acting in concert with
any of the defendants who are engaging in, or intend to engage in, the conduct
complained of herein, Defendants,
Randall A. Terry; Operation Rescue; and Thomas Herlihy, Defendants-Appellants,
Bernard Nathanson, Respondent,
Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence
Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson;
Bistate Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,
A. Lawrence Washburn, Jr., Counsel-Appellant.

Nos. 1427, 1552, 1553, Dockets 90-6187, 91-6011, 91-6029.

Argued May 20, 1991.

Decided April 13, 1992.

Before: KEARSE, MAHONEY, and SNEED*, Circuit Judges.

MAHONEY, Circuit Judge:

Defendants-appellants and respondents-appellants (other than Christopher Slattery) appeal[1] from an order entered May 10, 1990, and a final amended order entered July 9, 1990, of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, that (1) adjudged them in civil contempt of orders and a permanent injunction previously entered by that court, (2) assessed contempt penalties against them in amounts ranging from $25,000 to $100,000, and (3) assessed attorneys' fees and costs against them in amounts ranging from $3,190.02 to $157,505.81. Respondent-appellant Christopher Slattery

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* The Honorable Joseph T. Sneed, Judge of the United States District Court for the Ninth Circuit, sitting by designation.

[1] The appeals are complicated by various filings of notices of appeal followed by several vacaturs and reinstatements. After a careful review of the record, however, we are persuaded that all defendants-appellants and respondents-appellants, and counsel-appellant, are properly before us, except that respondent-appellant Bistate Operation Rescue Network has not perfected an appeal from the judgment entered against it on July 9, 1990 for $3,190.02 in attorneys' fees. We note that appeals have been noticed, presumably by inadvertence, on behalf of defendant Reverend James P. Lisante, against whom no order or judgment was entered, and respondent Bernard Nathanson, against whom no order or judgment was entered and whom the district court explicitly found not to have committed any civil contempt. *See* 732 F.Supp. at 406-07, 414. We note also that plaintiffs-appellees assert in their brief that respondent-appellant Adelle Nathanson has not taken an appeal, without contradiction by defendants-appellants and respondents-appellants in their reply brief or at oral argument. The record appears to indicate, however, that after stipulating to withdraw her then-pending appeal on January 24, 1991, respondent-appellant Adelle Nathanson filed a fresh notice of appeal on January 25, 1991.

appeals[2] from an order and judgment of that court entered December 26, 1990 that adjudged him in contempt of a preliminary injunction and a permanent injunction previously entered by that court, assessed a $50,000 contempt penalty against him, and stayed execution of judgment as to $25,000 on condition that Slattery commit no further violations of the injunctions. Counsel-appellant A. Lawrence Washburn, Jr. appeals from an amended final order of that court entered July 9, 1990 that assessed a sanction against him, pursuant to Fed.R.Civ.P. 11, in the amount of $11,712.47.

The appealed rulings are premised upon two published opinions, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y.1990), and *New York State National Organization for Women v. Terry*, 737 F.Supp. 1350 (S.D.N.Y.1990), and (as to respondent-appellant Christopher Slattery) an unpublished oral bench decision.

We reverse as to respondents-appellants Florence Talluto and Michael LaPenna and counsel-appellant; we otherwise affirm.

BACKGROUND

Plaintiffs-appellees are organizations that favor legalized abortion, health clinics that perform abortions, a doctor who performs abortions, and three religious leaders. Defendants-appellants are three individuals, Randall A.

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[2] The court's oral decision as to respondent-appellant Christopher Slattery was rendered November 8, 1990. He filed a notice of appeal on December 6, 1990, and the formal order and judgment against him was entered December 26, 1990. His appeal is validated by Fed.R.App.P. 4(a)(2).

Terry, Reverend James P. Lisante, and Thomas Herlihy, and an organization, Operation Rescue, opposed to legalized abortion. Plaintiffs also "named as defendants 'John Does' and 'Jane Does,' intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324, 1327 n. 2 (S.D.N.Y.1988). That conduct is the prevention of access to facilities in the New York City area performing abortions.

In *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1357-64 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) ("*Terry I*"), we affirmed a permanent injunction entered by the district court on January 10, 1989 against defendants' efforts to block access to abortion clinics in certain New York State counties because we concluded that those attempts violated 42 U.S.C. § 1985(3) (1988), as well as state trespass and public nuisance law. (The injunction provides for prospective civil contempt penalties of $25,000 per day for its violation, and each successive violation results in doubling of the sanction applicable to the contemnor. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. 1247, 1263-64 (S.D.N.Y.1989)). We also affirmed an earlier ruling entered October 27, 1988, *see New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324 (S.D.N.Y.1988), in which the district court held, *inter alia*, that: (1) defendants Terry and Operation Rescue were in contempt of that court's May 4 temporary injunction[3], which also provided for $25,000 per day sanctions, and imposed

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[3] *See* 697 F.Supp. at 1328. This injunction, adopted by the district court, was originally issued by the New York State Supreme Court, from which this action was removed. *See id.*

contempt sanctions of $25,000 against each of them; and (2) discovery sanctions pursuant to Fed.R.Civ.P. 37(a) (4) would be imposed against defendants. *See Terry I*, 886 F.2d at 1350-57. We modified the district court's ruling, however, by directing that the contempt sanctions be paid to the court, rather than to plaintiff-appellee *New York State National Organization for Women* ("*N.O.W.*"), which had provided "no evidence of actual injury [to *N.O.W.*] due to Operation Rescue's activities." 886 F.2d at 1354.

The district court's October 27, 1988 contempt ruling was "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. at 1338. Plaintiffs have since initiated contempt proceedings against various alleged participants in Operation Rescue's activities. *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 392-93. The demonstrators against whom plaintiffs sought contempt sanctions are the following organizations and persons: defendants-appellants Operation Rescue, Terry and Herlihy; respondent Bernard Nathanson; and respondents-appellants Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Florence Talluto, Michael LaPenna, Adelle Nathanson, Reverend Robert Pearson, and Christopher Slattery. *See id.* at 396 & n. 2.

Plaintiffs-appellees' contempt application relates to four days of demonstrations at various facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. *See id.* at 398. On all these dates, Operation Rescue members held demonstrations at which they blocked access to abortion facilities. *See id.* at 394-95. At the May 6, 1988 demonstration, the terms of the

May 4, 1988 temporary injunction were read aloud by the New York City police before arrests began. *See id.* at 394. Similarly, on January 13 and 14, 1989, police officers read the applicable permanent injunction to the demonstrators before initiating arrests. *See id.* at 395.

The district court found, with respect to defendants-appellants, that "all of the demonstrations at issue in these contempt proceedings were initiated and coordinated by Operation Rescue," *id.* at 398-99; Terry led the demonstrations, engaging in "purposeful conduct designed to violate the Court's orders," *id.* at 399; and Herlihy participated in the May 6 demonstration with notice of the district court's order against him. *See id.* The district court: (1) adjudged Terry and Operation Rescue to be in civil contempt of its October 27, 1988 order and permanent injunction, and assessed penalties in the amount of $100,000 against each of them; and (2) adjudged Herlihy to be in civil contempt of its May 4, 1988 order, and assessed a penalty in the amount of $25,000 against him. *See id.* at 413.

Contempt penalties were also assessed against respondents-appellants on the basis that "civil contempt sanctions may be assessed against nonparties who had actual notice of the [court's] orders in effect at the time in question and participated with defendants in violating those orders." *Id.* at 399-400. *See* Fed.R.Civ.P. 65(d) (order granting injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"). After addressing and rejecting most of respondents' arguments against the imposition of contempt sanctions, *see* 732 F.Supp. at 399-409, the district court found respondents-appellants in contempt of various of

the court's orders and assessed contempt penalties against them, as set forth in the margin[4]. The district court further ruled that: "Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her." 732 F.Supp. at 414. Finally, the district court granted plaintiffs-appellees' motion for the imposition of a Rule 11 sanction upon attorney A. Lawrence Washburn, concluding that "Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss." *Id.*

Subsequent to these rulings, the district court issued another opinion addressing plaintiffs' applications for

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[4] The district court ruled as follows.

Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.

732 F.Supp. at 413-14. As to respondent-appellant Christopher Slattery, *see supra* note 2 and accompanying text.

attorneys' fees and costs incurred as a result of: (1) litigating the main action[5], (2) bringing the contempt proceedings, and (3) Washburn's violation of Rule 11. *See New York State Nat'l Org. for Women v. Terry*, 737 F.Supp. 1350 (S.D.N.Y.1990). The district court granted all these applications, but reduced the dollar amounts from those sought by plaintiffs-appellees (except as to the Rule 11 sanction against Washburn, which application was granted in full). *See Id.* at 1358-67. Defendants-appellants were adjudged liable for attorneys' fees and costs pursuant to § 1988 in the amount of $157,505.81; contemnors (including defendants-appellants) were assessed fees and costs in the total amount of $83,000.69. Rule 11 sanctions were assessed against Washburn in the amount of $11,712.47. *See id.* at 1367.

This appeal followed. *See supra* notes 1 and 2.

DISCUSSION

A. The Merits and *Terry I.*

Appellants devote the bulk of their appeal to a reargument of issues that this court decided in *Terry I.* They contend that women are not a valid "class of persons" for

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[5] These fees were requested pursuant to 42 U.S.C. § 1988 (1988), which provides in pertinent part that:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

purposes of 42 U.S.C. § 1985(3)[6]; we held to the contrary in *Terry I*. *See* 886 F.2d at 1358-59. They argue that even if women are a valid class, appellants' actions directed at the prevention of abortions did not amount to the class-based animus required for a violation of § 1985(3); we ruled to the contrary in *Terry I*. *See Id.* at 1359-60. They argue that they did not violate any constitutional right to travel of persons seeking abortions; we held to the contrary in *Terry I*. *See id.* at 1360-61. They argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in *Terry I*. *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsideration in banc or a different ruling by the Supreme Court. *See*, *e.g.*, *Leecan v. Lopes*, 893 F.2d 1434, 1443 (2d Cir.), *cert. denied*, 496 U.S. 929, 110 S.Ct. 2627, 110 L.Ed.2d 647 (1990).

In addition, our determinations in *Terry I* constitute the law of the case. This doctrine requires that we "adhere[ ] 'to [our] own decision at an earlier stage of the litigation' unless there are 'cogent' or 'compelling' reasons not to, such

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[6] Section 1985(3) provides in pertinent part:

If two or more persons in any State ... conspire ... for the purpose of depriving, either directly or indirectly, *any person or class of persons* of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State ... from giving or securing to all persons within such State ... the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. (emphasis added).

as 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir.1990) (quoting *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983)). No such reason is presented here, at least at this juncture in the litigation.

We note in this regard that the Supreme Court has granted certiorari and heard oral argument in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir.1990) (per curiam), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). In that case, the Fourth Circuit explicitly invoked *Terry I* for the proposition that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." 914 F.2d at 585. Even if the Supreme Court were to reverse the Fourth Circuit in *Bray*, however, it is unlikely that appellants could benefit from that ruling in this case.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were premised not only upon § 1985(3), but also upon the independent state law grounds of trespass and public nuisance. *See Terry I*, 886 F.2d at 1361-62. (It is noteworthy in this regard that plaintiffs-appellees initiated this action in state court, and defendants-appellants removed it to federal court. *See supra* note 3.) Accordingly, the district court's actions can be sustained on these state grounds, which have not been separately challenged on this appeal, so long as the federal claim asserted by plaintiffs-appellees "ha[s] substance sufficient to confer subject matter jurisdiction on

the court." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (citing *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)); *see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 228 (6th Cir.1991) (remanding for consideration whether injunction improperly premised upon alleged violation of § 1985(3) should be reinstated on state grounds of trespass, nuisance, or tortious interference with business); *Roe v. Operation Rescue*, 919 F.2d 857, 867-68 (3d Cir.1990) (affirming injunction on unchallenged state grounds of trespass and intentional interference with contractual relations without addressing merits of § 1985(3) claim upon which injunction was also based).

Thus, only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795 (1904)). Given our ruling in *Terry I*, and the general state of the law on this issue, *see National Org. for Women v. Operation Rescue*, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims. This conclusion is subject, however, to the caveat that the petition for certiorari in *Bray v. Alexandria Women's Health Clinic* poses for review, *inter alia*, the question: "Are respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?", 59 U.S.L.W. 3508 (U.S. Jan. 21, 1991) (No. 90-985), and the grant of certiorari in *Bray* was not qualified regarding the questions

to be considered by the Supreme Court. *See* 498 U.S. 1119, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).

B. Contentions of Respondents-Appellants Not Foreclosed by *Terry I.*

Respondents-appellants, who were not parties to *Terry I*, have presented a number of arguments that are not foreclosed by *Terry I*, which we now address.

1. Asserted Failure to Comply with Fed.R.Civ.P. 4(j).

Rule 43(a) of the Civil Rules of the United States District Court for the Southern District of New York provides that a "proceeding to adjudicate a person in civil contempt of court ... shall be commenced by the service of a notice of motion or order to show cause." Where the alleged contemnor has not yet appeared in the action, "service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." *Id.*

Respondents-appellants, upon whom service of orders to show cause was made as required by Rule 43(a), contend that they should be regarded as the unknown John Doe(s) and Mary Doe(s) named in plaintiffs-appellees' complaint, *see* Fed.R.Civ.P. 10(a); i.e., as defendants "presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein." They accordingly claim status as *defendants*, rather than *respondents*, in this case.

It follows, they argue, that service of the orders to show cause was required to comply with Fed.R.Civ.P. 4(j), which provides in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Because they were not served with the orders to show cause "within 120 days after the filing of the complaint," or (as they alternatively contend in their reply brief) within 120 days of the demonstrations for which they were adjudged in contempt, respondents-appellants contend that plaintiffs-appellees "must begin their entire injunction case afresh against the Respondents, not having served them in time to participate in the case against the four known defendants."

Respondents-appellants cite *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080 (3d Cir.1988), and *Rankel v. Greenburgh*, 117 F.R.D. 50 (S.D.N.Y.1987), in support of this position, but these cases are not on point. *Napier's* only mention of Rule 4(j) was in relation to the improper service of named, not fictitious, parties. *See* 855 F.2d at 1088 n. 4. Similarly, Rankel involved a motion to dismiss a named, not fictitious, party, and that motion was denied. *See* 117 F.R.D. at 54-55 & n. 6.

We agree with the district court that "it is absurd to suggest that plaintiffs are forced to do the impossible:

foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 403. We conclude that the time constraints of Rule 4(j) do not apply to service in connection with a contempt proceeding arising out of violation of injunctions validly issued pursuant to Fed.R.Civ.P. 65(d). We next address respondents-appellants' claim that the injunctive orders in this case were not so issued.

2. Compliance with Fed.R.Civ.P. 65(d).

Respondents-appellants further contend that they were not "in active concert or participation" with defendants, as required by Rule 65(d), because their actions "were independently motivated" by their "political, social and moral positions on the subject of ... abortion." We have no reason to doubt this representation, but it is unavailing as an escape hatch from Rule 65(d). The rule is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.

Respondents-appellants also contend that the district court's injunctions failed to "set forth the reasons for [their] issuance" and, because some of the defendants were fictitiously named, were not "specific in terms" and did not "describe in reasonable detail ... the act or acts sought to be restrained," all as required by Rule 65(d). We disagree. The requirement of a statement of reasons "applies to the order granting the relief and does not require that the injunction itself set forth the reasons why the court granted the order." 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2955, at 539 (1973). Here, the district court issued an extensive opinion that set forth the reasons for the injunctions. *See New York State Nat'l Org. for Women v.*

Terry, 704 F.Supp. at 1257-64. As to respondents-appellants' other contention, the naming of fictitious defendants did not render the injunctions insufficiently precise because respondents-appellants had fair notice that acting in concert with the named defendants would subject them to contempt proceedings.

3. Service upon Talluto and LaPenna.

As noted earlier, Southern District Civil Rule 43(a) required that the order to show cause for the contempt motion be served upon respondents-appellants "personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Respondents-appellants Florence Talluto and Michael LaPenna contend that service upon them did not comply with this mandate.

The district court's order to show cause provided that if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400. Respondents were so served[7]. The district court concluded that its order allowing such service was proper under Fed.R.Civ.P. 4(c) (2) (C) (i), which allows service upon individuals "pursuant to the law of the state in which the district court is held." *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400-01.

The pertinent law is N.Y.Civ.Prac.L. & R. 308 (McKinney 1990). The district court concluded that service

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[7] Respondent-appellant Adelle Nathanson was also served in this manner, but no argument on this issue is advanced in her behalf on appeal. *See supra* note 1. The district court found that she had waived any objection to service, invoking Fed.R.Civ.P. 12(b) (5). *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400 n. 6.

was proper under paragraph 5 of section 308, which permits personal service upon a natural person "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one [personal service], two ['leave and mail' service[8]] and four ['nail and mail' service[9]] of this section." The issue then, is whether personal, leave and mail, and nail and mail service were all "impracticable." *See Dobkin v. Chapman*, 21 N.Y.2d 490, 497-99, 236 N.E.2d 451, 455-56, 289 N.Y.S.2d 161, 167-68 (1968); *Dime Savings Bank of New York, FSB v. Mancini*, 169 A.D.2d 964, 964-65, 564 N.Y.S.2d 859, 859-60 (3d Dep't 1991); *Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 838-39, 542 N.Y.S.2d 813, 814-15 (3d Dep't 1989); *Giordano v. McMurtry*, 79 A.D.2d 548, 548-49, 433 N.Y.S.2d 583, 584 (1st Dep't 1980), *aff'd mem.*, 53 N.Y.2d 962, 424 N.E.2d 555, 441 N.Y.S.2d 668 (1981).

LaPenna and Talluto argue that nail and mail was practicable. The district court disagreed, emphasizing that "'those who have flagrantly violated the court's orders are not disposed to make themselves readily available for

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[8] "Leave and mail" refers to:

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and ... either mailing the summons to the person to be served at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(2).

[9] "Nail and mail" refers to:

affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and ... either mailing the summons to such person at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(4).

personal delivery of notice that they are to be prosecuted for contempt of those orders.'" *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327 (App. Term 1st Dep't 1987), *aff'd mem.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989), *appeal dismissed*, 74 N.Y.2d 841, 545 N.E.2d 872, 546 N.Y.S.2d 558 (1989), *cert. denied*, 493 U.S. 1078, 110 S.Ct. 1130, 107 L.Ed.2d 1035 (1990)). The district court thought that *Department of Housing* "suggested that the manner of service is sufficient if it is 'reasonably calculated under all the circumstances to apprise respondents of the pendency of the action,'" *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing*, 137 Misc.2d at 462, 524 N.Y.S.2d at 327), and concluded that the service here was so calculated. *Id.*

We read *Department of Housing* differently. The "reasonably calculated" formulation stated by Appellate Term was addressed to the due process standard under the United States Constitution. This is made clear by the Appellate Term's citation, immediately following the quoted passage, of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), where it is stated that: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ...." In *Department of Housing*, the contemnor was served by leave and mail, *see* 137 Misc.2d at 461, 524 N.Y.S.2d at 326, and the court emphasized that respondent had been served in accordance with "one of the methods delineated in [section 308]." *Id.* at 462, 524 N.Y.S.2d at 327. Accordingly, the service in *Department of*

Housing complied with the constitutional standard *and* with section 308.

In this case, by contrast, there was concededly no compliance with paragraphs 1, 2, and 4 of section 308, so the issue becomes the impracticability standard of paragraph 5. The district court found impracticability because plaintiffs presented evidence of the "practical difficulties" they would encounter in effectuating service "because of respondents' demonstrated disregard for the authority of the Court." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. 401. This does not amount to a showing, however, that nail and mail service would not have been practicable.

As noted earlier, the district court's order to show cause allowed service by Federal Express at a respondent's "last known address" after two unsuccessful attempts at personal service. *See id.* at 400. Plaintiffs-appellees provided Federal Express with the names and last known addresses of LaPenna and Talluto. No reason appears why this information would not have sufficed for compliance with section 308(4); *i.e.*, a mailing to the "last known residence" of LaPenna and Talluto, and affixation of the documents to the door of each's "actual place of business, dwelling place or usual place of abode." *Id.* The order to show cause did not require any showing that there was any confusion as to the residence or dwelling place of any respondent-appellant, *i.e.*, any impracticability, before allowing a bypass of section 308(4).

It was claimed at oral argument that the bulky motion papers involved could not practically have been "nailed" to any door, but section 308 requires only that they be "affix[ed]," and this may "be accomplished by use of a nail, tack, tape, rubber band or some other device which will ensure a genuine adherence." *Pacamor Bearings, Inc. v.*

Foley, 92 A.D.2d 959, 960, 460 N.Y.S.2d 662, 664 (3d Dep't 1983). We conclude that, in the absence of any showing, or requirement of a showing, that nail and mail service was impracticable, service under section 308(5) should not have been authorized by the district court. *See Dobkin*, 21 N.Y.2d at 497-99, 236 N.E.2d at 455-56, 289 N.Y.S.2d at 167-68; *Dime Savings Bank*, 169 A.D.2d at 964-65, 564 N.Y.S.2d at 859-60; *Hitchcock*, 151 A.D.2d at 838-39, 542 N.Y.S.2d at 814-15; *Giordano*, 79 A.D.2d at 548-49, 433 N.Y.S.2d at 584.

When service is made pursuant to Fed.R.Civ.P. 4(c)(2)(C)(i), federal courts have no authority to stray from the requirements set by state law, here section 308, even if service in disregard of those requirements would still be constitutional. "[S]ervice of process must comply not only with constitutional requirements, but also with the provisions of the state statute." *FDIC v. Schaffer*, 731 F.2d 1134, 1136 (4th Cir.1984). Numerous federal courts have refused to exercise jurisdiction over parties who were not served in accordance with the pertinent state statute. *See, e.g., Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314-15 (5th Cir.1986); *Delta S.S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir.1985); *National Trust for Historic Preservation v. 1750 K Inv. Partnership*, 100 F.R.D. 483, 485-86 (E.D.Va.1984), *aff'd mem.*, 755 F.2d 927, 929 (4th Cir.1985); *Sun Sys. Prefabricated Solar Greenhouses, Inc. v. Venuti*, 596 F.Supp. 1516, 1517 (E.D.N.Y.1984). Similarly, we conclude that the district court lacked jurisdiction over Talluto and LaPenna.

4. The Rule 11 Sanction against Washburn.

The district court imposed a Rule 11 sanction upon counsel-appellant A. Lawrence Washburn, Jr. because he sought to renew a motion that asserted: "(1) lack of subject

matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c) (2) (C) (i) and (ii)." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 409. The court concluded that resubmission of the motion amounted to "vexatious conduct, which unduly delayed the adjudication of the contempt proceedings." *Id.* at 412.

The court previously invited renewal of the motion, which had originally been submitted upon inadequate papers, but cautioned that "in the event the motion is renewed and denied as frivolous, the Court would entertain a motion by plaintiffs for appropriate sanctions." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 410 (emphasis added).

One of the grounds asserted in the motion has been determined on appeal not only to be nonfrivolous, but meritorious, resulting in reversal of the district court's ruling as to service upon Talluto and LaPenna. Thus, in view of the terms of the district court's invitation to resubmit the motion, it would be unfair and inappropriate to sanction Washburn for having done so, and we accordingly reverse the judgment imposing a Rule 11 sanction upon Washburn. *See Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir.1990); *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785-86 (2d Cir.1988) (per curiam).

This result is consistent with our recent ruling in *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1254-55 (2d Cir.1992). In that case, we decided that it was not an abuse of discretion for the district court to impose Rule 11 sanctions upon a party that brought a motion (ultimately vindicated by our decision on appeal as

meritorious) which was barred at that juncture in the district court by the law of the case doctrine, and also untimely under a local rule. Here, by contrast, Judge Ward invited resubmission of a motion that had not originally been presented on proper papers, and was thus initially denied without prejudice, but warned against an ultimate determination that the motion was frivolous. The ensuing determination of frivolousness, and the accompanying sanction, cannot survive a ruling on appeal that a key ground of the motion was not only nonfrivolous, but in fact a correct statement of the pertinent law.

CONCLUSION

We reverse the judgments against respondents-appellants Florence Talluto and Michael LaPenna, and counsel-appellant A. Lawrence Washburn, Jr.; we affirm the judgments of the district court in all other respects.

SNEED, Senior Circuit Judge, Concurring Separately:

I concur in the court's reversal of the district court's orders directed at respondents-appellants Talluto, LaPenna, and counsel-appellant. I concur in Part A of Judge Mahoney's opinion solely because of the compelling force of the law of this circuit as set forth in *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) ("*Terry I*").

KEARSE, Circuit Judge, concurring and dissenting:

With all due respect, I dissent from so much of the majority opinion as reverses the district court's imposition of sanctions on defendants' attorney A. Lawrence Washburn, Jr., pursuant to Fed.R.Civ.P. 11 for a frivolous motion for

reargument. The basis of the reversal, *i.e.*, that the district court erred in deciding the underlying merits of one of the issues as to which reargument was sought, is contrary to our recent decision in *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245 (2d Cir.1992) ("*Virgin Atlantic*"). Further, even if that were a permissible basis for reversal of a sanctions award, there were two other indisputably sound bases for the district court's imposition of sanctions, making it inappropriate for us to do more than vacate the imposition of sanctions and remand to permit the district court to reconsider the matter of sanctions in light of our decision.

A. The Service-of-Process Issue

The motion that prompted the imposition of sanctions was threefold. It sought reargument of the district court's contempt order on the grounds of "'(1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c) (2) (C) (i) and (ii).'" (Majority Opinion ante at 396.) As to the third item, improper service, the fact that we have reversed the court's original decision does not mean that the sanctions award with respect to reargument must be reversed.

The imposition of Rule 11 sanctions is to be reviewed under an abuse-of-discretion standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In *Virgin Atlantic*, we held that though the court had erred on the merits of a certain question, it nonetheless had discretion to impose sanctions against a federal agency for an attempt to reargue the question on the sole basis of intervening decisions of a district court in another circuit. We recognized that the district court had

imposed sanctions for the agency's attempt to reargue a decided issue on the basis of insufficient new support, "not ... for the substance of its motion." *Virgin Atlantic* at 1255.

In the present case, despite the district court's repeated admonitions that Washburn's motion required the presentation of supporting affidavits and that frivolous filings could warrant sanctions, the motion to reargue lacked even the pretense of any new ammunition. (*See* Respondent's Memorandum Dated August 30, 1989, at 3: "[n]o new facts or affidavits are submitted and no new legal arguments are advanced".) Though the majority states that the district court "invited" the renewed motion, plainly the court did not invite it to be made on precisely the same papers as those on which it had just been denied. The district court's sanctions opinion, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y.1990) ("District Court Sanctions Opinion"), described the sequence. After rejecting counsel's original oral motion to dismiss on the grounds of improper service, "[t]he Court advised Washburn to submit a motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents." *Id.* at 410. Counsel then submitted the motion in writing, but again without affidavits. In denying the written motion "without prejudice," "[t]he Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of respondents concerning service." *Id.* In connection with this explanation and again in granting an extension of time, the court cautioned that Rule 11 sanctions might be imposed if a renewed motion were frivolous. Nonetheless, in connection with Washburn's renewal of the written motion,

> [n]o notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct in a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.

Id. Thus the court concluded that "[w]hile the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11." *Id.* at 412. On Washburn's motion to vacate the Rule 11 sanctions, the court stated that the "sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional support." *New York State National Organization for Women v. Terry*, 737 F.Supp. 1350, 1366 (S.D.N.Y.1990).

On this record, it is difficult for me to reconcile the majority's reversal of the imposition of sanctions against Washburn with either the abuse-of-discretion standard of review established by the Supreme Court in *Cooter & Gell* or with our Court's decision in *Virgin Atlantic*.

B. The Other Reargument Grounds that Elicited Sanctions

Even if reversal on the merits of the original motion were a basis for reversing an award of sanctions for a repetitive attempt to reargue, in the present case the

sanctions order should not be reversed outright because it was based on two additional reargruments by Washburn on which defendants have not prevailed on appeal. First, Washburn renewed the argument that the court lacked subject matter jurisdiction of the action. As a matter of principle, since that question was then pending on appeal, the district court could not revisit it. Second, he argued that the district court did not have the power to hold defendants in contempt because defendants had appealed from the entry of the injunction whose terms they had flouted. In light of the fact that defendants had twice tried, once in the district court and once in this Court, to obtain a stay of the injunction and had twice been denied, defendants' renewed challenge to the court's power to hold them in contempt -- like counsel's assertion that attorneys are immune from sanctions for frivolous court filings -- was frivolous. Thus, on these two issues, the district court stated that "[t]he arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service ..., were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate." District Court Sanctions Opinion, 732 F.Supp. at 412.

Imposition of sanctions on account of these frivolous challenges to the court's jurisdiction plainly was not an abuse of discretion. Accordingly, even if Virgin Atlantic did not exist as precedent, the most this Court could properly do is remand for the district court's consideration of whether to exercise its discretion to impose sanctions on these two bases alone, in light of the reversal on the merits of the service issue.